109-75

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~211~~. 27

OLIVER, FINNIE & CO., PLAINTIFFS IN ERROR,

vs.

THE RUMFORD CHEMICAL WORKS, FOR THE USE OF J. N. PAYNE AND HIS WIFE, KATE G. PAYNE, AS ADMINISTRATRIX OF ALLEN F. MORGAN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED APRIL 12, 1880.

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a UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1875, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 13th day of July, A. D. 1875, in the following cause, to wit:

J. N. PAYNE AND WIFE, KATE G. PAYNE, adm'x, plaintiff,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

1 *Summons.—Issued July 15th, 1875.*

The President of the United States of America to the marshal of the district of West Tennessee, greeting:

You are hereby commanded to summon J. N. Oliver, J. P. Finnie, & G. M. Weston, partners, doing business under the firm name & style of Oliver, Finnie & Co., citizens of the State of Tennessee, if they be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit, for the district of West Tennessee, at Memphis, on the 4th Monday in November next, and then and to answer J. N. Payne & his wife, Kate G. Payne, who is administratrix of the estate of Allen F. Morgan, dec'd, of a plea of trespass on the case, to their damage forty thousand dollars; herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this
2 19th day of July, in the year 1875, and 100th year of American Independence.

[L. S.] H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

Know all men by these presents that J. N. & Kate G. Payne & R. B. Payne are held and firmly bound unto Oliver, Finnie & Co. in the sum of two hundred and fifty dollars, to be void on condition that they, the said J. N. Payne & Kate G. Payne, do pay and satisfy all costs that may accrue in that behalf in the prosecution of a suit the 13th day of July commenced by them in the circuit court of the United States for the district of West Tennessee, at Memphis, against said Oliver, Finnie & Co., on failure of the plaintiffs to prosecute said suit with effect, and also on failure of the defendant, if convicted, to pay said costs.

Witness our hand and seal this 12th day of July, 1875.

J. N. PAYNE & KATE G. PAYNE,
By HARRIS, McK. & TURLEY, [SEAL.]
Att'ys.
R. B. PAINE. [SEAL.]

(Endorsed:) No. 1916.

3 U. S. district court for the district of West Tennessee, at Memphis, Tenn., July 27th, 1875.

J. N. PAYNE ET ALS.
vs.
OLIVER, FINNIE & CO. } 1916.

Personally appeared before me, a com'r of the U. S. circuit court for the district of West Tennessee, Robert B. Payne, who, being by me first duly sworn, deposes and says that he is the owner of the following described real estate in this district in his own name and right and subject to
4 execution, and that it is of a greater value than $250, to wit: a tract of 300 acres of land lying in Tipton County, on the Mississippi River, below the foot of I. 35 & above the head of I, 36, being a part the C. Paine tract.

R. B. PAINE.

Subscribed & sworn to before me this 27th day of July, A. D. 1875.

Came to hand July 13th, 1875, executed by making known to J. N. Oliver the contents of this summons, and delivering to him a copy of the same, together with a copy of the bill, July 28th, 1875, and further executed by making known to J. P. Finnie & G. M. Weston the contents of this summons and delivering to each of them a copy of the same Sept. 1st, 1875.

L. B. EATON, *U. S. M.*
WM. KOCH, *Deputy.*

Sums, 6.00; copies, 2.00; mileage, .40—$8.40.

5 *Declaration.—Filed July 13th*, 1875.

In the circuit court of the United States for the western district of Tennessee, in the sixth judicial circuit.

J. N. PAYNE AND HIS WIFE, KATE G. PAYNE, who is administratrix of the estate of Allen T. Morgan, dec'd, plaintiffs,
versus
J. N. OLIVER, J. P. FINNIE, AND G. M. WESTON, partners, doing business under the firm name and style of Oliver, Finnie & Co., defendants.

The plaintiffs complain of the def'd'ts being, &c., of a plea of trespass on the case. For that whereas one E. N. Horseford, being a citizen of the United States of America, was before & at the time of the making of the letters patent, and of the committing of the grievances by the said defendants as hereinbefore mentioned, the original, & first inventor of a certain new & useful improved method of preparing acid phosphate of lime, which said invention was new & useful, & not known or used before the discovery thereof by the said Horseford, & was not at the time of his application for the patent mentioned hereafter in public use or one sale with his,

6 Horseford's, consent or allowance, and thereupon the United States of America, heretofore, to wit, on the fourteenth (14) day of April, 1868, at Washington, in the District of Columbia, by its letters patent here shown to the court, bearing date the day & year aforesaid, under its great seal, & reciting that the said E. N. Horseford, of Cambridge, Mass., had alleged that he had invented a new and improved method of preparing acid phosphate of lime, & had made oath that he was a citizen of the United States, & that he verily believed he was the original and first inventor or discoverer of the said invention, and that the same had not to his knowledge & belief been previously known or used, & had paid into the Treasury of the United States the sum of thirty-five doll's, & presented a petition to the Commissioner of Patents praying that a patent might be issued therefor, did grant to the said Horseford, his executors, administrators, or assigns, for the term of seventeen years from

7 said 14 day of April, 1868, the full & exclusive right & liberty of making, using, & vending to others to be used, the s'd invention above mentioned, a description of which is a part of said letters patent, all of which, by said letters patent, reference being thereunto had, will, amongst other things, more fully & at large appear; and pl't'ffs further say that this patent or invention, after being patented, was known as Horsford's patent cream of tartar substitute, for the purpose of manufacturing self-rising cereal flour, and Horseford's patent pulverulent phosphoric acid; and plaintiffs further say that the said E. N. Horseford afterwards, and before the committing of the several grievances hereinafter mentioned, to wit, on the 28th day of July, 1868, by a certain written assignment under his seal, here to the court shown, the date whereof is the day & year last aforesaid, for the consideration therein mentioned, did, amongst other things, assign, transfer, & set over unto the Rum-

8 ford Chemical Works, a corporation under the laws of the State of Rhode Island, all his right, title, and interest in the said invention & patent above mentioned, as by the said assignment, which is now of record in the Patent Office, reference being thereunto had, will, amongst other things, more fully & at large appear; and pl't'ffs further say that afterwards, & before the grievances hereinafter mentioned, to wit, on the 1st day of Feb'y, 1869, by its written assignment or conveyance here to the court shown, executed under its corporation seal & bearing date the day & year last above mentioned, for the consideration therein mentioned, the said Rumford Chemical Works did sell, assign, & transfer unto one Allen F. Morgan, of Memphis, Tennessee, the right & power to use said patent & the exclusive right to manufacture, sell, & use during the time of five (5) years from said date, to wit, from 1st Feb'y, 1869, the article known as self-rising flour from cereals, by the use of Horsford's

9 patent pulverulent phosphoric acid, in the following described territory, to wit: Beginning at the point where the northern boundary of the State of Tennessee touches the Mississippi River, thence southerly, along said river, to & including Vicksburg; thence easterly along the line Mississippi Southern Railroad, to Jackson; thence northerly, along the line of Mississippi Central Railroad, to Grenada; thence northeasterly, to the junction of the eastern boundary line of Alabama with the southern boundary line of Tennessee; thence along the eastern boundary line of Middle Tennessee (so called), to the northern boundary

line of Tennessee, & thence westwardly, along said boundary line, to the point of beginning, as by said assignment & conveyances, reference being thereunto had, will more fully & at large appear; and the plaintiffs further say that the said Allen F. Morgan departed this life intestate, in Shelby County, Tenn., on the day of April, 1869, being still the owner of said
10 rights for five years from the 1st Feb'y, 1869, and that on the day of July, 1869, plaintiff Kate G. Payne, who was then a single woman & was the widow of said Allen, duly administered upon his estate in the county of Shelby, & that she has since intermarried with her co-plaintiff. Said letters of administration are here to the court shown. And plaintiffs further say that the said E. N. Horsford from the time of issuing of said patent up to the time of his assignment to the Rumford Chemical Works, as above mentioned, and the said Rumford Chemical Works from that time until its conveyance to said Allen F. Morgan, dec'd, as above set out, and the said Allen & pl't'ffs from that time until the committing of the grievances hereinafter mentioned, did always by themselves, their deputies, servants, & agents in that behalf, make, use, exercise, & vend said invention, & the self-rising cereal flour made thereunder, in the dis-
11 trict & territory above described & mentioned to their great advantage & profit. And plaintiffs say further that the said Allen F. Morgan's rights in said invention & patent as above set out was very valuable & worth the full am't of fifty thousand dollars. And plaintiffs further aver and say that the said defendants, well knowing the premises, but contriving and wrongfully and injuriously intending to injure the said plaintiffs and to deprive them of the profits, benefits, and advantages which they might and otherwise would have derived and acquired from the making, using, exercising, and vending said invention did unlawfully and unjustly and without authority, infringe the rights of plaintiff Kate G. Payne, administratrix as aforesaid, and her coplaintiff throughout the territory and district aforesaid within the said term of 5 years, to wit, from the 1st day of April, 1870, to the 1st day of Feb'y, 1874, and did without
12 the leave or license and against the will of plaintiffs, or either of them, make use of said patent and did manufacture and sell and use the article known as self-rising flour from cereals by the use of Horsford's pulverulent acids in all of said territory and district above described to the amount and value of fifty thousand dollars in each year from said 1st April, 1870, to 1st Feb'y, 1874, and did interrupt and prevent the use and enjoyment by the said Kate and her coplaintiff of the rights aforesaid and did obstruct and hinder her so that she and they were unable to make any profit therefrom. All of which acts and doings of defendants were done and performed with a full knowledge of the rights of said Kate G. and her coplaintiff, and within the period of said 5 years from Feb'y 1, 1869, whereby the said plaintiffs have been and are greatly injured and deprived of the profits and advantages which they might and other-
13 wise would have derived and acquired by their exercise of their above-mentioned rights in the territory above mentioned. To the damage of the said plaintiff fifty thousand dollars, and therefore they bring their suit.

HARRIS, McKISSICK & TURLEY,
Att'ys for Pl't'ffs.

14 *Plea.—Filed Feb'y 10th*, 1876.

Circuit court of the United States, 6th circuit, W. dist. of Tennessee. November term, 1875.

J. N. PAYNE & WIFE
vs.
OLIVER, FINNIE & CO.

1. And now the said defendants, by Pierce & Dix, their attorneys, come and defend the wrong and injury, when, &c., and say that they are not, nor is any of them guilty of the said supposed grievances above laid to their charge, or either or any part thereof, in manner and form as the said plaintiffs have above thereof complained against them; and of this they put themselves upon the country.

PIERCE & DIX, *Att'ys.*

2. And for further plea the said defendants say that the said Rumford Chemical Works mentioned in the declaration did not, on the 1st day of April, 1869, or at any other time, sell, transfer, or assign unto said Allen F. Morgan the right and power to use said E. N. Horsford's pat-
15 ent mentioned in the declaration, as in said declaration they have alleged, or any interest or share therein or thereunder; and of this they put themselves upon the country.

PIERCE & DIX, *Att'ys.*

3. And for futher plea the said defendants say that the said conveyance or assignment mentioned in the declaration, made by the said Rumford Chemical Works to said Allen F. Morgan on the 1st day of Feb'y, 1869, is not and was not an assignment of any interest or share in a patent right or patented invention, but was a mere license granted to said Morgan personally, revocable at any time at the pleasure of said Rumford Chemical Works, and that said license was fully revoked and annulled at, to wit, on the 1st day of May, 1869, both by the death of said Allen F. Morgan and by the act of the said Rumford Chemical Works, and all authority to use or claim the same or any benefit thereunder was thereby com-
16 pletely taken away from said Allen F. Morgan's heirs and representatives, and from the plaintiffs before the commission by these defendants of any of the acts complained of as grievances in said declaration mentioned; and this they are ready to verify, &c. Wherefore, &c.

PIERCE & DIX, *Att'ys.*

4. And defendants, for further plea, say that during the life time of said Allen F. Morgan, to wit, on the 1st day of January, 1866, the said Rumford Chemical Works was the owner of a patent or invention known as "Horsford's method of manufacturing acid phosphate of lime, or cream of tarter substitute, for the purpose of manufacturing self-rising cereal flour, and Horsford's patent pulverulent phosphoric acid," under an assignment from said E. N. Horsford, and that the said patent mentioned in the declaration as granted E. N. Horsford on the 14th day of April, 1868, was a renewal of said Horsford's patent, or was substantially the same
17 patent, and on said 1st day of January, 1866, the said Rum-

ford Chemical Works, by its written assignment or conveyance, executed under its corporate seal, bearing date the day and year last above mentioned, for a valuable consideration, did sell, assign, and transfer to said Allen F. Morgan the right and power to manufacture, sell, and use, during the term of five years from said date, to wit, until the 1st day of January, 1871, the article known as self-rising flour from cereals, by the use of Horsford's patent pulverulent phosphoric acid, in the same territory described in the contract, as dated February 1st, 1869, which said assignment and conveyance by the said Rumford Chemical Works, made on the 1st day of January, 1866, was in the same words and figures, or of the same tenor and effect, as the said conveyance or assignment made on the 1st day of February, 1869; and the said Allen F. Morgan, during the years 1867, 1868, and the month of January, 1869, was engaged
18 under a contract with these defendants in manufacturing, selling, and using self-rising flour, under his said conveyance or assignment from said Rumford Chemical Works, and afterwards, to wit, on the 1st day of February, 1869, the said Rumford Chemical Works claimed that its said conveyance or assignment, dated January 1st, 1866, was merely a license to said Morgan to manufacture, use, and sell self-rising flour from cereals, by the use of acid phosphate of lime, made under said Horsford's patent, during the pleasure of said Rumford Chemical Works, and that it was revocable at any time; all which these defendants well knew, and the said Allen F. Morgan informed and admitted to these defendants and to other persons, with the knowledge of these defendants, that he had no right under said assignment or conveyance that the Rumford Chemical Works could not, at any time, take away, and these defendants, said Allen F. Morgan and said Rumford Chemical Works made and entered
19 into contracts with and between each other upon the claim of said Rumford Chemical Works, and the admission of said Allen F. Morgan that all his rights and authority under said conveyance or assignment from said Rumford Chemical Works to him, the said Morgan, could at any time be taken away and revoked by said Rumford Chemical Works; and acting upon the said admissions of said Allen F. Morgan, the said Rumford Chemical Works, with the knowledge of the defendants, on the 1st day of February, 1869, did revoke the said so-called assignment or conveyance dated January 1st, 1866; and afterwards, to wit, on the 1st day of February, 1869, the said Rumford Chemical Works, after having refused so to do without the consent of these defendants, as said Morgan well knew, did, by and with the consent of these defendants, make and execute the written instrument mentioned in the declaration dated
20 February 1st, 1869, which is substantially the same as the one revoked; and, as a part of the same transaction, said Allen F. Morgan and these defendants entered into an agreement in writing, dated February 15th, 1869 (although it was made on the 1st of February, 1869), under which they were to manufacture, use, and sell self-rising flour by the use of acid phosphate of lime, made under said Horsford's patent mentioned in the declaration, until the 1st day of April, 1870. And defendants aver that when said contract was made, to wit, on the 1st day of February, 1869, the said Allen F. Morgan was insolvent, and these defendants purchased machinery and went to other expenses, to be used in and for the manufacture, sale, and use of said self-rising flour, all which was done

with the full knowledge of all said parties, to wit, the Rumford Chemical Works, said Allen F. Morgan, and these defendants; that the said
21 Rumford Chemical Works claimed, and said Allen F. Morgan admitted, that the said license, assignment, or conveyance, meaning the said written instrument executed by the said Rumford Chemical Works Feb'y 1st, 1869, mentioned in the declaration, was revocable at any time by the said Rumford Chemical Works. And defendants further aver that after the death of said Allen F. Morgan, to wit, on the 1st day of May, 1869, the said Rumford Chemical Works revoked said license, assignment, or conveyance made to said A. F. Morgan Feb'y 1, 1869, and refused to allow the representations of said Morgan, and particularly his widow and administratrix, said Kate G. Payne (then Morgan), one of plaintiffs, to carry on said business under said patent and agreement, and refused to allow defendants to carry out their agreement made with said Morgan, and so informed these defendants. And afterwards, to wit, on the 1st day of
22 May, 1869, the said Rumford Chemical Works, by its written assignment or agreement, dated May 1st, 1869, did sell, assign, and convey to these defendants the exclusive right to manufacture, use, and sell, for the term of five years, to wit, until the 1st day of May, 1874, the article known as self-rising flour from cereals by the use of Horsford's patent pulverulent phosphoric acid, in certain territory, to wit, the territory described in the assignment mentioned in the declaration dated February 1st, 1869. And this the said defendants are ready to verify. Wherefore, they pray judgment, &c.

PIERCE & DIX, *Att'ys.*

UNITED STATES OF AMERICA,
Western Dist. of Tennessee, ss:

Before me personally appeared J. N. Oliver, of the firm of Oliver, Finnie & Co., the defendants, who, being duly sworn, made oath that the facts stated in the above pleas are true to the best of his knowledge, in-
23 formation, and belief.

J. N. OLIVER.

Subscribed and sworn to before me this 10th day of Feb'y, 1876.
H. E. ANDREWS, *Clerk.*

24 Further proceedings had on, to wit, the 21 day of Dec., 1876, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

In this on motion of defendants' attorneys, it is ordered that defendants have leave to file an additional plea herein.

25 *Amended plea.—Filed Dec.* 26, 1876.

J. N. PAYNE AND KATE G. PAYNE, HIS WIFE,
v.
OLIVER, FINNIE & CO.

5. And now the said defendants, by their attorneys, by leave of the court

first had and obtained, come and defend, when, &c., and for plea say that the United States of America did not, on the 14th day of April, 1868, or at any other time grant to said E. N. Horsford the exclusive right to make, use, and vend to others to use, said supposed invention, to wit: "A new and useful improved method of preparing acid phosphate of lime," as is alleged in the declaration. And of this they put themselves upon the country.

PIERCE & DIX,
26 *Def'ts' Att'ys.*

6. And for further plea the defendants say that the said method of preparing acid phosphate of lime, alleged in said declaration to have been invented by said E. N. Horsford, as stated in the declaration, was not patentable.

PIERCE & DIX, *Att'ys.*

7. And for further plea the defendants say that the said patent, mentioned in the declaration as having been granted by the United States of America to E. N. Horsford on the 14th day of April, 1868, was null and void.

PIERCE & DIX,
Def'ts' Att'ys.

8. And for further plea the said defendants say that the said patent described in the declaration *in the declaration* granted by the United States of America to said E. N. Horsford, on the 14th day of April, 1858, as the inventor of a "new and useful improved method of preparing acid phosphate of lime," as alleged in the declaration, is void for want of novelty.

PIERCE & DIX,
Def'ts' Att'ys.

9. And for further plea the said defendants say that during the life time of Allen F. Morgan, to wit, on the 1st day of January, 1866, the said Rumford Chemical Works was the owner of a patent or in-
27 vention known as "Horsford's method of manufacturing acid phosphate of lime or cream-tartar substitute, for the purpose of manufacturing self-rising cereal flour and, Horsford's patent pulverulent phosphoric acid" under an assignment from said E. N. Horsford, and that the said patent mentioned in the declaration as granted E. N. Horsford on the 14th day of April, 1868, was a renewal of said Horsford's patent, or was substantially the same patent, and on said 1st day of January, 1866, the said Rumford Chemical Works, by its written assignment or conveyance, executed under its corporate seal, bearing date the day and year last above mentioned, for a valuable consideration, did sell, assign, and transfer to said Allen F. Morgan the right and power to sell, manufacture, and use, during the term of five years next after said date, to wit, until the 1st day of January, 1871, the article known as self-rising
28 flour from cereals by the use of Horsford's patent pulverulent phosphoric acid, in the same territory described in the contract mentioned in the declaration as dated Feb'y 1st, 1869, which said assignment and conveyance, by the said Rumford Chemical Works, made on the 1st day of January, 1866, was in the same words

and figures, or of the same tenor and effect as the said conveyance or assignment made on the 1st day of February, 1869; and the said Allen F. Morgan, during the years 1867, 1868, and the month of January, 1869, was engaged under a contract with these defendants in manufacturing and selling self-rising flour under his said conveyance or assignment from said Rumford Chemical Works, and afterwards, to wit, on the 1st day of February, 1869, the said Rumford Chemical Works claimed that its said conveyance or assignment, dated January 1st, 1866, was merely a license to said Morgan to sell, manufacture, and use self-rising flour from ce-
29 reals by the use of acid phosphate of lime made under said Horsford's patent during the pleasure of said Rumford Chemical Works, and that it was revocable at any time, all which said Allen F. Morgan, and these defendants well knew, and said Allen F. Morgan informed and admitted to these defendants and to other persons with the knowledge of these defendants, that he had no rights under said assignment or conveyance that the Rumford Chemical Works could not at any time take away, and said Rumford Chemical Works, said Allen F. Morgan, and these defendants, made and entered into contracts with and between each other upon the claim of said Rumford Chemical Works, and the admission of said Allen F. Morgan that all his rights and authority under said conveyance or assignment from said Rumford Chemical Works to him, the said Morgan, could at any time be taken away and revoked by said Rum-
30 ford Chemical Works; and acting upon the said admissions of said Allen F. Morgan, the said Rumford Chemical Works, with the knowledge of these defendants, on the 1st day of February, 1869, did revoke the said so-called assignment or conveyance dated January 1st, 1866, and afterwards, to wit, on the 1st day of February, 1869, the said Rumford Chemical Works, after having refused so to do without the consent of these defendants, as said Morgan well knew, did, by and with the consent of these defendants, make and execute the said written instrument mentioned in the declaration, dated February 1, 1869, which is substantially the same as the one revoked, and as part of the same transaction said Allen F. Morgan and these defendants entered into an agreement in writing, dated February 15th, 1869 (although it was made on the 1st day of February, 1869), under which they were to manufacture, use, and sell self-rising flour by the use of acid phosphate of lime made under said Horsford's patent mentioned in the declara-
31 tion, until the 1st day of April, 1870, and defendants aver that when said contract was made, to wit, on the 1st day of February, 1869, the said Allen F. Morgan was insolvent, and these defendants purchased, machinery and went to other expenses to be used in and for the manufacture, sale, and use of said self-rising flour, all which was done with the full knowledge of all said parties, to wit: The Rumford Chemical Works, said Allen F. Morgan, and these defendants; that the said Rumford Chemical Works claimed, and said Allen F. Morgan admitted that said conveyance or assignment, executed February 1, 1869, mentioned in the declaration, was revokable at any time by the Rumford Chemical Works, and defendants aver that in all these transactions they, these defendants, acted in ignorance of the contents, of said Allen F. Morgan's said written conveyance, or assignment executed February 1st, 1869, mentioned in the declaration, and relying *safely* upon the representations to them

made by said Morgan of the contents, purport, and effect of said written conveyance or assignment. And defendants further aver that after the death of said Allen F. Morgan, to wit, on the 1st day of May, 1869, the said Rumford Chemical Works revoked said license, assignment, or conveyance made to said Allen F. Morgan, February 1st, 1869, and refused to allow the representatives of said Morgan, and particularly his widow, said Kate G. Payne (then Morgan), to carry on said business under said agreement, and refused to allow defendants to carry out their agreement made with said Allen F. Morgan, as aforesaid, and so informed these defendants, and afterwards, to wit, on the 1st day of May, 1869, the said Rumford Chemical Works, by its written assignment or agreement, dated May 1st, 1869, did sell, assign, and convey to these defendants the exclusive right to manufacture, use, and sell, for the term of five years, to wit, until the 1st day of May, 1874, the article known as self-rising flour from cereals by the use of Horsford's patent pulvurulent phosphoric acid in certain territory, to wit, the territory described in the assignment, mentioned in the declaration as dated February 1st, 1869. And defendants aver that it was under and by virtue of this agreement with or assignment from the said Rumford Chemical Works that all the acts and grievances mentioned in the declaration were by them committed, and defendants aver that they, said defendants, were induced to enter into said agreement, dated May 1st, 1869, and were led and induced to commit all said acts and grievances complained of in the declaration by the acts of said Allen F. Morgan, and his admissions that the conveyance or assignment dated January 1st, 1866, (and therefore the contract or assignment dated February 1, 1869,) was revokable at any time by the Rumford Chemical Works, and therefore these defendants aver that said plaintiffs are estopped by the acts and admissions of said Allen F. Morgan above mentioned, and this they are ready to verify.

PIERCE & DIX,
Def'ts' Att'ys.

Demurrer to 4, 6, 7, 8, 9 *pleas.—Filed Feb.* 17, 1877.

Circ't c't United States, sixth circ't, W. dist. Tenn.

J. N. PAYNE AND WIFE
v.
OLIVER, FINNIE & CO. } 1916. Law docket.

The plaintiffs come by attorneys and demur to the defendants from the (4) and 9 pleas in this cause, and for ground of demurrer say:

1. That even if Allen F. Morgan did make the admissions claimed in said plea to have been made by him in the manner and form therein set out by that said conveyance from said chemical works to him was only a license and revocable, &c., such admissions would not have justified the defendants in making the infringements which they are charged with on plaintiffs' interest in said patent. Such admissions cannot have the legal effect which is claimed for them on the said plea.

2. The plea on its face shows that said admissions could not have induced said infringements, because the acts of infringment

were done and committed by defendants after the death of said Allen F. Morgan.

3. The plea does not allege that the acts of infringement were caused and induced by said alleged admissions, wherefore plaintiffs pray judgment whether defendants ought to be allowed to further rely upon the matter set up in said plea.

4. Said plea is filled with immaterial matters and refers to and sets up matters which in no way affect this controversy. And plaintiffs demur to the 6, 7, and 8 pleas, and for ground of demurrer shows:

1st. Said pleas set up matters in defense which cannot be investigated in this character of action.

2d. Said pleas seek to attach collaterally letters patent issued by the United States.

3d. In a suit for infringement of a patent the courts cannot go behind the letters patent and investigate the facts on which and proceed-
37 ings by which they were issued as their pleas, seek to have it do.

4th. The matters set up in said pleas can only be investigated in a direct proceeding brought according the manner pointed out by law for that purpose.

G., P. & L. & H., McK., & T., *Att'ys.*

38 *Replication to 3d plea.—Filed Feb.* 17, 1877.

In the circuit court of the United States for the 6th circuit, western district of Tenn.

J. N. PAYNE AND WIFE }
vs.
OLIVER, FINNIE AND CO. }

And the said plaintiffs come by attorneys, and say that the said defendants ought not to be admitted or received to plead the said plea by him thirdly above pleaded, as to so much thereof wherein he alleges "that the said conveyance or assignment, mentioned in the declaration made by the said Rumford Chemical Works to said Allen F. Morgan, on the 1st day of February, 1869, is not and was not an assignment of any interest or share in a patent right or patented invention, but was a mere license granted to said Morgan personally, revocable at any time by said Rumford Chemical Works." That said license was fully revoked and annulled on 1' May, '69, by the death of Morgan, &c., because they say that on the 30th day of July, 1870, in the first circuit court of Shelby County,
39 Tennessee, a court having jurisdiction of the subject-matter and the parties—the plaintiff, Kate G., under her then name of Kate G. Morgan, &c., as administratrix of Allen F. Morgan, dec'd, impleaded the said defendants to the Sept. term, 1870, of said court, for the breach of an agreement or contract made on 15' July, 1869, between said Allen F. Morgan and the defendants, by which they were to manufacture and prepare, in connection with each other, and in accordance with the stipulations in said contract contained, the said self-rising flour, by the use of acid phosphate of lime made under said Horsford's patent. Said contract was to last until the 1st day of April, 1870, and it was made under the rights which said Allen F. Morgan acquired by said conveyance

or assignment made to him on the 1st day of February, 1869, by said Rumford Chemical Works.

And plaintiffs say further that, as a defense to said suit, the said defendants set up and relied upon exactly the same matters and things
40 which are alleged in the 3d plea as above set out, viz: "That the said conveyance or assignment made by the said Rumford Chemical Works to said Allen F. Morgan, on the 1st day of February, 1869, is not and was not assignment of any interest or share in a patent right or patented invention, but was a mere license granted to said Morgan personally, revocable at any time at the pleasure of said Rumford Chemical Works, and that said license was fully revoked and annulled on 1 May, 1867, by said Morgan's death," &c., and thereupon said proceedings were had in said cause on that plea and defense that afterwards, in the supreme court of the State of Tennessee, to which court said cause had been carried by appeal in error, at the April term, 1872, thereof, to wit, on 4' day of June, 1872, by the consideration and judgment of said court upon hearing on the merits, it was solemnly and finally adjudged, determined, and decreed
41 that said conveyance or assignment made by the said Rumford Chemical Works to said Allen F. Morgan on the 1st day of February, 1869, is and was an assignment of an irrevocable interest or share in the said patent-right or patented invention, and that the same was not a mere license granted to said Morgan personally, revocable at any time at the pleasure of said Rumford Chemical Works, and that the same was not revoked by the death of said Morgan, &c., and this is, plaintiffs allege, a final and conclusive adjudication of the matter between the said parties, the plaintiffs and defendants, all of which, by the record and proceedings thereof still remaining in the said supreme court more fully and at large appears, which said opinion and judgment still remains in full force and effect, not in the least reversed, satisfied, or made void; and this the said plaintiffs are ready to verify by the record.

Wherefore they pray judgment if the said defendants ought to
42 be admitted or received against the said record to plead the plea of their thirdly above pleaded in this suit, that said conveyance and assignment made by said works to said Morgan is a mere license and not an assignment of any interest in said patent, &c., &c.

HARRIS, McKISSICK & TURLEY,
For Pl'ffs.

43 *Replication to* 1, 2, 3, & 5 *pleas.—Filed Feb.* 17, 1877.

Circuit court of the United States for 6th cir't, W. dist. of Tenn.

J. N. PAYNE AND WIFE
v.
OLIVER, FINNIE AND CO.

And the said plaintiffs, as to the pleas of the said defendants, by them first and secondly and fifthly above pleaded, and whereof they have put themselves upon the country, doth the like.

HARRIS, McKISSICK & TURLEY,
Att'ys for Plaintiffs.

And plaintiffs, for replication to the 3d plea, say that the conveyance mentioned in the declaration was an assignment of an interest on the patent mentioned in the declaration, and was not a mere license, revocable, as is set up in said plea.

HARRIS, McK. & TURLEY,
For Pl'ffs.

44 Further proceedings had on, to wit, the 2' day of March, A. D. 1877, in the following cause, to wit.

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE & CO., DEFENDANT. } No. 1916.

This cause was heard on the demurrers interposed by plaintiffs to the 4th, 6th, 7th, 8th, and 9th pleas by defendants pleaded, and the court being advised in the premises, it is considered that the demurrer to the 9th plea is well taken, but leave is granted to defendants to amend and to add in said plea, on the fifth page thereof, at the middle of the page and after the words "the Rumford Chemical Works," these words, "and de-
45 fendants aver that in all the transactions they, these defendants, acted in ignorance of the contents of said Allen F. Morgan's said written conveyance or assignment, executed February 1st, 1869, mentioned in the declaration, and relying safely upon the representations to them made by said Morgan of the contents, purport, and effect of said written conveyance or assignment," which amendment or addition is now made, and accordingly said plea as amended is allowed to stand. It is further considered that the plaintiffs' demurrers to the 6th, 7th, and 8th pleas are not well taken, and they are severally overruled and for nought held, and defendants withdraw their 4th plea from the record, and plaintiffs are allowed twenty days in which to reply to the 6th, 7th, & 8th, and 9th pleas of defendants.

46 *Replication to* 6, 7, & 8 *pleas.—Filed Dec.* 6., 1877.

In circ't c't of U. S. for dist. West Tenn.

PAYNE AND WIFE
v.
OLIVER, FINNIE AND CO. } # 1916. Law docket.

And plaintiffs come by attorney, and for replication to 6th plea say that the method of preparing acid phosphate of lime, mentioned in said plea, was patentable, and this they pray may be enquired of by the country.

And for replication to the 7th and 8th plea they say that they join issue on said pleas.

GANTT, P. & LOWE.
HARRIS, McKISSICK & TURLEY,
For Plaintiffs.

47 *Replication to 9th plea.—Filed Dec. 6, 1877.*

In the circuit court of the United States for the 6th circ't, W. Dist. of Tenn.

J. N. PAYNE AND WIFE
v.
OLIVER, FINNIE & CO.

And the said plaintiffs, as to the said plea by the said defendants' ninthly (9thly) above pleaded, say that the said plaintiffs, by reason of anything by the said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendants, because they say that the said Rumford Chemical Works did not on the 1st February, 1869, or at any other time, claim that its said conveyance or assignment dated January 1, 1856, *or* 'as merely a license to said Morgan, revocable at any time at its pleasure; and the said Allen F. Morgan did not at any time or in any manner admit to defendants or to said chemical works, or to any one else, that he had no right under
48 said assignment or conveyance that the said chemical works could not at any time take away, as is in said plea untruly alleged and set up. And the plaintiffs say further that the said defendants and the said Morgan and the said chemical works did not make and enter into contracts with each other on any admissions of said Morgan, and that all his rights under said assignment could at any time be taken away from him; they also say that the said chemical works did not, on account of said admissions, on February 1, 1869, revoke said license; and they further say defendants did not act in this matter and in these transactions in ignorance of the contents of the conveyance of February 1, '69, to said Morgan, and execute the new assignment, because they say, as stated above, that no such admissions were ever made by said Morgan, nor did said chemical works refuse to execute said assignment of February
49 1, 1869, until defendants agreed thereto. And they say further that the contract of February 15, 1869, between defendants and Morgan was not made or induced by any admissions of Morgan that said assignment could be revoked by said chemical works. And plaintiffs further aver and say that after said Morgan's death, and before defendants procured from said chemical works any assignment of any interest in said patent, they were notified by plaintiff Kate G., as administratrix of Allen F. Morgan, dec'd, of her rights under said assignment of February 1, 1869, and of her intention and desire to continue the business of manufacturing self-rising flour thereunder, and this plaintiffs pray may be inquired of, &c.

HARRIS, McKISSICK & TURLEY, *Att'ys.*

And the said plaintiffs, for further replication, by attorneys, say that the said defendants ought not to be admitted or received to plead any part
50 of the said plea by them ninthly & 9thly above pleaded, because they say that on the 30th day of July, 1870, in the first circuit court of Shelby County, Tennessee, a court having jurisdiction of the subject-matter and the parties, the plaintiff Kate G., under her then name of Kate G. Morgan, and as administratrix of Allen F. Morgan, dec'd, impleaded the said defendants to the September term, 1870, of said court, for

the breach of the contract or agreement mentioned in said plea as entered into February 15th, 1869, between defendants and said Morgan, under which they were to manufacture, use, and sell self-rising flour under said patent. And plaintiffs say further that, as a defense to said suit, the said defendants set up and relied upon the same matters and things which are now alleged and set up by them in said 4' plea. And thereupon such proceedings were had in said cause on that plea and defense that afterwards, in the supreme court of Tenn., to which court said cause had been
51, 52 carried by appeal in error, at the April term, 1872, thereof, to wit, on the 4' day of June, 1872, by the consideration and judgment of said court it was solemnly and finally adjudged, determined, and decreed that the matters and things set up in said plea were not true, and could not avail defendants as a defence to said action. And this is, plaintiffs allege, a final and conclusive adjudication of the said matters between said parties, the plaintiffs and defendants; all of which, by the record and proceedings thereof, still remaining in the said supreme court, more fully and at large appears. Which said opinion and judgment still remains in full force and effect, not in the least reversed, satisfied, or made void, and the plaintiffs are ready to verify by the record. Wherefore they pray judgment if the said defendants ought to be admitted or received against the said record to plead the plea by them jointly above pleaded, &c.

HARRIS, McKISSICK & TURLEY, *Att'ys.*

53 Further proceedings had on, to wit, the 21' day of Jan'y, A. D. 1878, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

On motion of defendants' attorneys, leave is granted them to retake the deposition of George F. Wilson, of Providence, R. I., and on motion of plaintiffs' attorneys, leave is granted them to amend their declaration.

54 *Amended declaration.—Filed Jan'y* 21, 1878.

In the circuit court of the United States for the western district of Tennessee, in the sixth judicial circuit.

THE RUMFORD CHEMICAL WORKS, A CORPORATION chartered by the laws of Rhode Island, for the use of J. N. Payne and his wife, Kate G. Payne, who is administratrix of the estate of Allen F. Morgan, dec'd, plaintiff,
vs.
J. N. OLIVER, J. P. FINNIE, AND G. M. WESTON, partners, doing business under the firm name and style of Oliver, Finnie and Co., defendants.

The plaintiffs complain of the defendants being, etc., of a plea of trespass on the case. For that whereas one E. N. Horsford, being a citizen of the United States of America, was, before and at the time of the making of the

letters patent and of the committing of the grievances by the said defendants, as hereinafter mentioned, the original and first inventor of a new and novel improvement in preparing phosphoric acid as a substitute for
55 other solid acids, which said invention was new and useful, and not known or used before the discovery thereof by the said Horsford, and was not at the time of his application for the patent mentioned hereafter in public use or on sale with his, the said Horsford's, consent or allowance. And thereupon the United States of America heretofore, to wit, on the twenty-second day of April, 1856, at Washington, in the District of Columbia, by its letters here shown to the court, bearing date the year and day aforesaid, under its great seal, and reciting "that the said E. N. Horsford, of Cambridge, Mass., has alleged that he had invented a new and useful improvement in preparing phosphoric acid as a substitute for other solid acids, and had made oath that he was a citizen of the United States, and that he verily believed he was the original and first inventor or discoverer of the said invention, and that the same had not to his knowledge and belief been previously known or used, and had paid into the Treasury of the United States
56 the sum of thirty dollars and presented a petition to the Commissioner of Patents praying that a patent might be issued therefor, did grant to the said E. N. Horsford, his executor, administrator, or assignee, for the term of fourteen years from the said 22d day of April, 1856, the full and exclusive right and liberty of making, using, and vending to others to be used the said invention above mentioned, a description of which is a part of said letters patent, all of which as by said letters patent, which are herewith filed and made a part of this declaration, will, amongst other things, more fully and at large appear and plaintiffs further say that this patent or invention, after being patented, was known as "Horsford's patent cream of tartar substitute for the purpose of manufacturing self-rising cereal flours," and Horsford's patent pulverulent phosphoric acid, and plaintiffs further say that said E. N. Horsford
57 afterwards and before the committing of the several grievances hereinafter mentioned, did assign, transfer, and set over unto the Rumford Chemical Works, a corporation under the laws of the State of Rhode Island, all his right, title, and interest in the said invention and patent above mentioned, and plaintiffs further say that afterwards and before the grievances hereinafter mentioned, to wit, on the 7th day of May, 1867, the said Rumford Chemical Works did, under the acts of Congress in such cases made and provided, surrender the above-mentioned letters patent, and obtained in lieu thereof, on an amended specification, new letters patent numbered 2597 for improvement in the manufacture of phosphoric acid, all of which will appear from said letters patent and specifications herewith filed and made a part of this declaration. And plaintiffs aver that afterwards, on the 9th day of June, 1868, the said Rumford Chemical Works
58 did, under the acts of Congress in such cases made and provided, surrender the above-mentioned letters patent numbered 2597, and obtained in lieu thereof on an amended specification new letters patent for and improvement in pulverulent acid for use in the preparation of soda powders, farinaceous food, and for other purposes, all of which will appear from said letters patent and specifications herewith filed and made a part of this declaration, and plaintiffs further say that afterwards and before the

committing of the several grievances hereinafter mentioned, to wit, on the 22d day of April, 1870, the said C. N. Horseford upon the proper petition under the acts of Congress in such cases made and provided obtained an extension of the above-mentioned letters patent as reissued May 7th, 1867, and June 9th, 1868, for a period of seven years from said 22d day of April, 1870, all of which will more fully appear from said ex-
59 tension, which is herewith filed and made a part of this declaration.

And plaintiffs aver that afterwards, to wit, on the twenty-second day of May, 1870, the said E. N. Horsford, by his written assignment, the date whereof is the day and year last aforesaid, for the consideration therein mentioned, did assign, transfer, and set over unto the said Rumford Chemical Works all his right, title, and interest in the said inventions and patents above mentioned as extended, as by the said assignment, which is now of record in the Patent Office, and a copy of which is herewith filed and made a part of this declaration, will more fully appear.

The said corporation and we, the Rumford Chemical Works did, on the said 1st day of February, 1869, for a valuable consideration, sell, assign, and convey in writing to Allen F. Morgan, of Memphis, Tenn., all its
60 rights and powers to use said patent, and the exclusive right to manufacture, sell, and use, during the period of five years from February 1st, 1869, the article known as self-rising flour from cereals, by the use of Horsford's patent pulverulent phosphoric acid, in the following territory, to wit: Beginning at the point where the northern boundary line of the State of Tennessee touches the Mississippi River; thence southerly along said river to and including Vicksburg; thence easterly along the line of the Mississippi Southern R. R. to Jackson; thence northerly along the line of the Mississippi Central R. R. to Grenada; thence northeasterly to the junction of the eastern boundary line of Alabama with the southern boundary line of Tennessee; thence along the eastern boundary line of Middle Tennessee (so called) to the northern boundary line of Kentucky; thence westerly along said boundary line to the be-
61 ginning. Said written grant from said corporation to said Allen F. Morgan is here to the court shown. And plaintiffs aver that the said Allen F. Morgan departed this life on 19 day of April, 1869, being still the owner of said right under said assignment and grant from said corporation for said period of five years from February 1st, 1869; & *and* that on the day of July, 1869, plaintiff Kate G., who was then a single woman, and was the widow of said Allen, duly administered upon his estate in the county or probate court of Shelby County, Tennessee, and that she has since intermarried with the coplaintiff. Said letters of administration are here to the court shown. And plaintiffs further say that the said Rumford Chemical Works, from the time said patent was issued until its conveyance to the said Allen F. Morgan, dec'd, as above mentioned, and the said Allen and plaintiffs from that time until the committing of the grievances hereinafter mentioned, did always
62 by themselves, their deputies, servants, and agents in that behalf, make, use, exercise, and vend said invention and the self-rising cereal flours made thereunder, in the district and territory above described and mentioned, to their great advantage and profit. And plaintiffs say further that the said Allen F. Morgan's rights in said invention and

patent, as above set out, was very valuable, and worth the full amount of fifty thousand dollars. And plaintiffs further aver and say that the said defendants Oliver, Finnie and Co., well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the said plaintiffs, and to deprive them of the profits, benefits, and advantages which they might, and otherwise would, have derived and acquired from making, using, exercising, and vending said invention, did unlawfully, and unjustly,
63 and without authority, infringe upon the rights of the plaintiff Kate G. Payne, adm'x as aforesaid, and her coplaintiff, throughout the territory aforesaid within the said term of five years, viz, from the 1st day of April, 1870, to the 1st day of February, 1874, and did, without leave or license, and against the will of plaintiffs, make use of said patent, and did manufacture, sell, and use the article known as self-rising flour from cereals, by the use of Horsford's patent pulverulent phosphoric acid, in all of said territory and district above described, to the amount and value of fifty thousand dollars in each year from said 1st April, 1870, to 1st February, 1874, and did interrupt and prevent the use and enjoyment by the said Kate and her coplaintiff of the rights aforesaid, and did obstruct and hinder her so that she and they were unable to make any profit therefrom. All of which acts and doings of defendants were done
64 and performed with a full knowledge of the rights of said Kate G. and her coplaintiff, and within the period of said five years from February 1, 1869, whereby the said plaintiffs have been, and are, greatly injured and deprived of the profits and advantages which they might, and otherwise would, have derived and acquired by the exercise of their above-mentioned rights under said patent in the territory described above, to the damage of plaintiff fifty thousand dollars; whereupon they bring this suit.

GANTT, P. AND LOWE,
HARRIS, McK. AND TURLEY,
Att'ys for Plaintiffs.

The plaintiffs further complain that whereas one E. N. Horsford, being a citizen of the United States of America, was, before and at the time of the making of the letters patent, and of the committing of the grievance by the said defendants, as hereinafter mentioned, the original and first inventor of a new and novel improvement in preparing phos-
65 phoric acid as a substitute for other solid acids, which said improvement was new and useful and not known or used before the discovery thereof by the said Horsford, and was not at the time of his application for the patent, mentioned hereafter in public use or on sale with his, the said Horsford's, consent or allowance; and thereupon the United States of America, heretofore, to wit, on the twenty-second day of April, 1856, at Washington, in the District of Columbia, by its letters patent, here shown to the court, bearing date the day and year aforesaid, under its great seal, and reciting that the said E. N. Horsford, of Cambridge, Mass., has alleged that he has invented a new and useful improvement in preparing phosphoric acid as a substitute for other solid acids, and had made oath that he was a citizen of the United States, and that he verily believed he was the original and first inventor or discoverer of the
66 said invention, and that the same had not to his knowledge and

belief been previously known or used, and had paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents praying that a patent might be issued therefor, did grant to the said E. N. Horseford, his executor, administrator, or assigns, for the term of fourteen years from the said 22nd day of April, 1856, the full and exclusive right and liberty of making, using, and vending to others to be used the said invention above mentioned, a description of which is a part of said letters patent, all of which, as by said letters patent, which are herewith filed and made a part of this declaration, will, amongst other things, more fully and at large appear; and plaintiffs further say that this patent or invention, after being patented, was known as

67 "Horsford's patent cream of tartar substitute, for the purpose of manufacturing self-rising cereal flours," and "Horsford's patent pulverulent phosphoric acid;" and the plaintiffs further say that the said E. N. Horseford afterwards, and before the committing of the several grievances hereinafter mentioned, did assign, transfer, and set over unto the Rumford Chemical Works, a corporation under the laws of the State of Rhode Island, all his right, title, and interest in the said invention and patent above mentioned; and plaintiffs further say that afterwards and before the grievances hereinafter mentioned, to wit, on the 7th day of May, 1867, the said Rumford Chemical Works did, under the acts of Congress in such cases made and provided, surrender the above-mentioned letters patent, and obtained in lieu thereof, on an amended specification, new letters patent, numbered 2597, for improvement in the manufacture of phosphoric acid, all of which will appear from said letters patent and specifi-

68 cations herewith filed and made a part of this declaration. And plaintiffs aver that afterwards, on the 9th day of June, 1868, the said Rumford Chemical Works did, under the acts of Congress in such cases made and provided, surrender the above-mentioned letters patent, numbered 2597, and obtained in lieu thereof on an amended specification new letters patent for an improvement in pulverulent acid, for use in the preparation of soda powders, farinaceous food, and for other purposes, all of which will appear from said letters patents and specifications herewith filed and made a part of this declaration. And plaintiffs further say that afterwards, and before the committing of the several grievances hereinafter mentioned, to wit, on the twenty-second day of April, 1870, the said E. N. Horsford, upon the proper petition filed under the acts of Congress in such cases made and provided, obtained an extension of the

69 above-mentioned letters patent, as reissued May 7th, 1867, and June 9th, 1868, for a period of seven years from said twenty-second day of April, 1870, all of which will more fully appear from said extension, which is herewith filed and made a part of this declaration. And plaintiffs aver that afterwards, to wit, on the twenty-second day of May, 1870, the said E. N. Horsford, by his written assignment, the date whereof is the day and year last aforesaid, for the consideration therein mentioned, did assign, transfer, and set over unto the said Rumford Chemical Works all his right, title, and interest in the said inventions and patents above mentioned as extended, as by the said assignment, which is now of record in the Patent Office, and a copy of which is herewith filed and made a part of this declaration, will more fully appear; and the said cor-

70 poration, viz, the Rumford Chemical Works, did, on the said 1st

day of February, 1869, for a valuable consideration, sell, assign, and convey, in writing, to Allen F. Morgan, of Memphis, Tennessee, all its rights and powers to use said patent, and the exclusive right to manufacture, sell, and use during the period of five years, from February 1st, 1869, the article known as self-rising flour from cereals, by the use of Horseford's patent pulverulent phosphoric acid, in the following territory, to wit: Beginning at the point where the northern boundary line of Tennessee touches the Mississippi River; thence southerly along said river to and including Vicksburg; thence easterly along the line of the Mississippi Southern R. R. to Jackson; thence northerly along the line of the Mississippi Central R. R. to Grenada; thence northeasterly to the junction of the eastern boundary line of Alabama with the southern boundary
71 line of Tennessee; thence along the eastern boundary line of "Middle Tennessee" (so called) to the northern boundary line of Kentucky; thence westerly along the said boundary line to the beginning. Said written grant from said corporation to said Allen F. Morgan is here to the court shown. And plaintiffs aver that the said Allen F. Morgan departed this life on the day of April, 1869, being still the owner of said right under said assignment and grant from said corporation for said period of five years from February 1, 1869, and that on the day of July, 1869, plaintiff Kate G., who was then a single woman, and was the widow of said Allen, administered upon his estate in the county or probate court of Shelby County, Tennessee, and that she has since intermarried with the coplaintiff. Said letters of administration are here to the court shown. And plaintiffs further say that the said Rumford Chemical Works, from the time said patent was issued until its conveyance to the said Allen F. Morgan, dec'd, as above
72 mentioned and the said Allen and the plaintiffs from that time until the committing of the grievances hereinafter mentioned did always by themselves, their deputies, servants, and agents in that behalf make, use, exercise, and vend said invention and the self-rising cereal flours made thereunder in the district and territory above described and mentioned to their great advantage and profit; and plaintiffs further say that the said Allen F. Morgan's right in said invention and patent as above set out was very valuable, and worth the full amount of fifty thousand dollars; and plaintiffs further aver and say that upon the death of the said Allen F. Morgan, as above mentioned, the defendants and the said Rumford Chemical Works, although they well knew the plaintiffs' right in the premises, but contriving and wrongfully and injuriously intending to injure plaintiffs and to deprive them of the benefits
73 and advantages which they might and otherwise would have derived and acquired from the making, using, exercising, and vending said invention did unlawfully and unjustly agree and combine together to infringe the rights of plaintiffs throughout the territory and district aforesaid within the said term of five years, to wit, from April 1870, to February, 1874; and as a part of said agreement and combination, and to carry out the same, the said Rumford Chemical Works made a pretended assignment, grant, or power to said defendants of the same character of rights in and under said above-mentioned patent over the district above described for the said period of five years, to wit, from April, 1870, to February, 1874, which had previously been granted by

said corporation to said Morgan, as hereinbefore mentioned; and plaintiffs further aver that under this agreement and combination the said
74 defendants, jointly and *and* in connection with said Rumford Chemical Works, have unlawfully and unjustly and without authority infringed the rights of plaintiff Kate G. Payne, administratrix as aforesaid, and her coplaintiff throughout the territory and district aforesaid within the said term of five years' time from the 1st day of April, 1870, to the first day of February, 1874, and have, without the leave or license, and against the will of plaintiffs, or either of them, made use of said patent, and have manufactured, used, and sold the article known as self-rising flour from cereals by the use of Horsford's pulverulent acids in all of said territory and district above described, to the amount and value of fifty thousand dollars in each year from said first day of April, 1870, to first February, 1874, and have interrupted and prevented the use and enjoyment
75, 76 by the said Kate and her coplaintiff of the rights aforesaid, and have obstructed and hindered her, so that she and they have been to make any profit therefrom; all of which acts and doings of defendants and of the Rumford Chemical Works were done and performed with full knowledge of rights of said Kate G. and her coplaintiff, and within the period of said five years from February 1st, 1869. Whereby the said plaintiffs have been and are greatly injured, and deprived of the profits and advantages which they might and otherwise would have derived and acquired by their exercise of their above-mentioned rights in the territory above mentioned, to the damage of the said plaintiff fifty thousand dollars; wherefore they bring their suit.

GANTT, PATTERSON & LOWE,
HARRIS, McKISSICK & TURLEY.

77 In the circuit court of the United States, sixth judicial circuit, western district of Tennessee, November term, 1875.

J. N. PAYNE AND WIFE
vs.
OLIVER, FINNIE & CO.

Demurrer to amended declaration.—Filed Jan. 25th, 1878.

And the said defendants, by their attorneys, crave oyer of said instrument in writing by which it is alleged, in said amended declaration, said Rumford Chemical Works did sell, assign, and convey to said Allen F. Morgan, &c., and it is read to them in these words, the same being in two separate parts or instruments:

PART 1.

"To all people to whom these presents shall come, the Rumford Chemical Works, a corporation transacting business in East Providence, in the State of Rhode Island, sends greeting:

"Know ye that the said corporation, in consideration of the agreement, of even date herewith, entered into between it and Allen F. Mor-
78 gan, of Memphis, in the county of Shelby and State of Tennessee, does hereby sell, assign, and transfer unto the said Allen F. Mor-

gan the right to use, within the territory described in said agreement, Horsford's patent cream of tartar substitute, for the purpose of manufacturing within said territory self-*ra*ising cereal flours, with the right to use and sell the flours so manufactured; to have and hold and exercise such rights within the limits aforesaid, for and during the time and under and subject to the conditions and limitations named and specified in the agreement aforesaid, of even date herewith, to which reference is hereby made as a part hereof.

"In testimony whereof the said corporation have caused these presents to be signed, and its corporate seal to be hereunto affixed, on this first day of February, A. D. eighteen hundred and sixty-nine, by George F. Wilson, its treasurer and agent, for this purpose duly authorized.

"GEO. F. WILSON, *Treas'r.*

"Signed, sealed, and delivered in presence of—

"WILLIAM S. LYON."

79 2 PART.

"To all men to whom these presents shall come:

"Know ye that the Rumford Chemical Works, a corporation located at and doing business in the town of East Providence, in the State of Rhode Island, has licensed and granted unto Allen F. Morgan, of the city of Memphis, county of Shelby and State of Tennessee, the exclusive right to manufacture, sell, and use during the time of five years from the date hereof, the article known as self-*ra*ising flour from cereals by the use of Horsford's patent pulverulent phosphoric acid, in the following described territory, to wit: Beginning at the point where the northern boundary of the State of Tennessee touches the Mississippi; thence southerly along the said river to and including Vicksburg; thence easterly along the line of the Mississippi Southern R. R. to Jackson; thence northerly along the line of the Mississippi Central R. R. to Grenada; thence northeasterly to the junction of the eastern boundary line of Alabama with the southern boundary line
80 of Tennessee; thence along the eastern boundary line of Middle Tennessee (so called) to the northern boundary line of Tennessee, and thence westerly along said boundary line to the point*ing* of beginning, by an instrument in writing bearing even date herewith, which is made a part of this agreement, and because of other good any sufficient reasons moving him thereto, that he has agreed, and by these presents does covenant and agree, to and with the aforesaid Rumford Chemical Works, that he will immediately commence the manufacture of self-rising flour in accordance with the written instructions furnished by said Rumford Chemical Works, as to proportions and quality of flour, and that he will use all his business tact and skill and all other means necessary to introduce and sell the same, and to make the sale thereof as large as in any was possible in the territory aforesaid, during the continuance of the license aforesaid and no longer;
81 and to sell the said self-rising flour nowhere but in the territory specified except upon the written consent of the said Rumford Chemical Works; and I agree to accept in the aforesaid license such rights as are covered by the patents granted to Eben N. Horsford and by him assigned to the said Rumford Chemical Works, and to maintain them at my own cost and expense in suits at law whenever it shall be in my judgment

necessary so to do; and to avail myself of such advice, counsel, and assistance as the said Rumford Chemical Works may elect to give in said suits, and to purchase all of the acid used in making over said self-rising flour, of the Rumford Chemical Works or of their agents as directed, and that in case of my failure to perform the covenants and agreements hereby entered into, it shall be lawful for the said Rumford Chemical Works to annul and revoke their said license to me and to terminate this agreement.

82 The use of said *said* phosphoric acid by families for domestic purposes shall not be construed as a violation of this agreement.

"In testimony whereof the party hereto has hereunto affixed his hand and seal this first day February, A. D. 1869.

"ALLEN F. MORGAN.

"Signed, sealed, and delivered in presence of—
"Att: J. P. FINNIE."

Which being read and heard, the said defendants say that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiffs to have and maintain their said action against said defendant; and they, the said defendants, are not bound by law to answer the same, and this they are ready to verify; wherefore, by reason of the insufficiency of said declaration in this behalf, the said defendants pray judgment, and that the said plaintiffs may be barred from having and maintaining their aforesaid action against him, &c.

83 and the said defendants, according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer:

1. That the said instruments of writing above set forth are not an assignment by said Rumford Chemical Works to said Allen F. Morgan, of any interest in said patents in the 1st and 2d counts of said amended declaration described, but are merely a license to said Morgan to use the said patented invention for certain limited purposes and for a certain limited time less than the whole period of the duration of the patent, and do not give to said Morgan, or to the plaintiffs as his representatives, any right to maintain this action in their own names.

2. That said declaration and each count of said declaration is in other respects uncertain, informal, and insufficient.

Wherefore, &c.

ESTES & ELLETT AND
PIERCE & DIX,
Def't's Att'ys.

84 *Further proceedings had on to wit, the 25' day of Feb., A. D. 1878, in the following cause, to wit:*

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

This cause being heard on the demurrer of the defendants to the amended declaration filed on the 21st of January, 1878, and the same having been

argued and considered by the court, and the court being of opinion that the plaintiffs are not entitled to maintain this action in their own names, the instrument under which they claim being a license, and not an assignment of the patent. It is therefore considered by the court that
85 the declaration is not sufficient in law to maintain this action, and that the same be sustained, and the plaintiffs pray leave further to amend the writ and declaration by striking out the names of said J. N. Payne and Kate G., his wife, as plaintiffs, and by inserting in the said declaration, in lieu thereof, the names of the Rumford Chemical Works, a corporation chartered by the laws of Rhode Island, for the use of J. N. Payne and wife, Kate G. Payne, administratrix of Allen F. Morgan, dec'd, and the court allowed said amendment to be made, on the payment of all costs occasioned by making the said Payne and wife plaintiffs in this suit, and said amendment may be made by inserting the words, "the Rumford Chemical Works, a corporation chartered by the laws of Rhode Island, for the use, &c.," on the face of said declaration. To which amendment the defendant then and there excepted.

86 Circuit court of the United States, western district of Tennessee.

RUMFORD CHEMICAL WORKS FOR THE USE OF J. N. Payne and Kate G. Payne, his wife, adm'x, &c.,

v.

OLIVER, FINNIE & CO.

Pleas to plaintiffs' amended declaration.—Filed May 28th, 1878.

1. And now the said defendants, by their attorneys, come and defend the wrong and injury when, &c., and say that they are not, nor is any of them guilty of the said supposed grievances above laid to their
87 charge, or any or either or any part thereof in manner and form as the said plaintiffs have above thereof complained against them, and of this they put themselves upon the country.

PIERCE & DIX AND
ELLETT & ESTIS,
Att'ys.

2. And for further plea the defendant' say that the said several supposed causes of action in said declaration mentioned (if any such there were or are) did not nor did any or either of them accrue to the said plaintiffs at any time within three years next before the filing of said amended declaration in manner and form as the said plaintiffs have thereof complained against them; and this they are ready to verify.

ESTES & ELLETT AND
PIERCE & DIX, *Att'ys.*

3. And for further plea the defendants say that the said supposed causes of action in said declaration mentioned (if any such there were or
88 are) did not nor did any or either of them accrue to the said plaintiffs at any time within six years next before the filing of said amen-

ded declaration, in manner and form as the said plaintiffs have thereof complained against them; and this they are ready to verify.

ESTES & ELLET AND
PIERCE & DIX, *Att'ys.*

4. And for further plea the defendants say they have replead and reaffirm their several pleas filed herein to the declaration and all defences stated in the notice herein as fully as if the same were here fully set out as pleas to said amended declaration.

ESTES & ELLETT AND
PIERCE & DIX, *Att'ys.*

5. And for further plea the defendants say that on or before the 1st day of April, 1870, the said Rumford Chemical Works refused to sell, and would not and did not sell to said plaintiffs, or either of them, the article known as Horsford's patent pulverulent phosphoric acid,
89 and so refused to sell, and would and did not sell to said plaintiffs said acid for a period of five years then next following; and this they are ready to verify. Wherefore, &c.

ESTES & ELLETT AND
PIERCE & DIX, *Def'ts Att'ys.*

6. And for further plea the defendants say that for the period of five years next after the 1st day of January, 1870, to wit, until the 1st day of January, 1875, the said Rumford Chemical Works, without the request or solicitation of these defendants, or any of them, hindered and prevented the said plaintiffs from manufacturing, selling, or using the article known as self-rising flour from cereals by the use of Horsford's patent pulverulent phosphoric acid in any and every part of said territory in said declaration described; and this they are ready to verify. Wherefore, &c.

ESTES & ELLETT AND
PIERCE & DIX, *Att'ys.*

90 7. And, for further plea, the defendants say that during the lifetime of said Allen F. Morgan, to wit, on the 1st day of January, 1866, a contract was entered into between said Rumford Chemical Works and said Morgan, of the same import and effect as said contract dated February 1st, 1869, as set forth in the declaration herein, by which the said Rumford Chemical Works conveyed and assigned to said Morgan the exclusive right to manufacture, sell, and use, during the term of five years from January 1st, 1866, to wit, until January 1st, 1871, throughout certain territory therein mentioned, to wit, the same territory described in said contract of February 1st, 1869, as set forth in said declaration, the said article described in said contract of February 1st, 1869, to wit, the article known as self-rising flour from cereals by the use of Hors-
91 ford's Patent Pulverulent Phosphoric Acid, and while said contract was in full force and effect, afterwards to wit, on 30th day of May, 1868, the said Allen F. Morgan filed in the district court of the United States for the western district of Tennessee, in bankruptcy, his petition praying that he the said Allen F. Morgan might be declared a bankrupt, and that he enumerated in his schedule of assets filed with said petition his interest in the said patent right for preparing self-rising flour, held un-

der said assignments from the Rumford Chemical Works, and afterwards, to wit, on the 9th day of May, 1869, the said Morgan was adjudged a bankrupt, and as assignee of said bankrupt's estate was duly appointed, and all the right of said Morgan in, to, or under said contract passed to his said assignee, by whom they have never been sold or transferred, and the said Rumford Chemical Works were not at the date of said con-
92 tract with said Morgan mentioned in the declaration, to wit, February 1st, 1869, the owner of the exclusive right to manufacture, use, and sell in the territory therein described the said article known as self-rising flour, &c. as therein described. And this they are ready to verify, &c.

PIERCE & DIX,
ESTES & ELLETT, *Att'ys.*

8. And for further plea the defendants say that during the life time of said Allen F. Morgan, to wit, on the 1st day of January, 1866, the said Rumford Chemical Works was the owner of the patent described in said amended declaration, and on that day by its written assignment or conveyance executed under its corporate seal, bearing date the day and year last above mentioned, for a valuable consideration did sell, assign, and
93 transfer to said Allen F. Morgan the exclusive right to sell, manufacture and use during the term of five years next after said date, to wit, until the 1st day of January, 1871, the article known as self-rising flour from cereals by the use of Horsford's patent pulverulent phosphoric acid in the same territory described in the contract mentioned in the declaration and described as dated February 1st, 1869, which said assignment and conveyance was in the same words and figures, except its date, as the said assignment dated February 1st, 1869, and the said Allen F. Morgan during the years 1867, 1868, and the month of January, 1869, was engaged under a contract with these defendants in manufacturing and selling self-rising flour under his said assignment or conveyance from said Rumford Chemical Works, and afterwards, to wit, on the 1st day of February, 1869, the said Rumford Chemical Works claimed that its said assign-
94 ment or conveyance dated January 1st, 1866, was merely a license to said Morgan to sell, manufacture and use self-rising flour from cereals by the use of acid phosphate of lime made under said Horsford's said patent during the pleasure of said Rumford Chemical Works, and that it was revocable at any time, all which said Allen F. Morgan and these defendants well knew, and said Allen F. Morgan informed and admitted to these defendants and to other persons, with the knowledge of these defendants, that he had no rights under said assignment that the Rumford Chemical Works could not at any time take away, and said Rumford Chemical Works, sent Allen F. Morgan, and these defendants made and entered into with and between each other, upon the claim of said Rumford Chemical and the admission of said Morgan that all his rights and authority under said assignment to him could at any time be taken away and revoked by said Rumford Chemical
95 Works, and on said 1st day of February, 1869, the said Rumford Chemical Works did, or attempted to, revoke said assignment, dated January 1st, 1866, and said Allen F. Morgan then and there admitted that said Rumford Chemical Works had revoked and annulled the said assignment, conveyance, or license dated January 1st, 1866. And

afterwards, to wit, on the 1st day of February, 1869, the said Rumford Chemical Works, after having refused so to do without the consent of these defendants, make and execute the said written instrument in the amended declaration mentioned, dated February 1st, 1869; and as a part of the same transaction, said Morgan and these defendants entered into an agreement in writing, dated February 15th, 1869, (although it was made February 1, 1869,) under which defendants were to manufacture, use, and sell self-rising flour by the use of said acid phosphate of lime, made under said Horsford's patent, until the 1st day of April, 1870. And defend-
96 ants aver that when said contract was made, to wit, on the 1st day of February, 1869, it was understood between all the said parties, the Rumford Chemical Works, said Morgan, and these defendants, that said Rumford Chemical Works claimed, and said Morgan admitted, that said assignment or license was revocable at any time by the said Rumford Chemical Works. And defendants aver that in all these transactions they, these defendants, acted in ignorance of the contract of said Allen F. Morgan's said written conveyance or assignment, executed February 1st, 1869, mentioned in the declaration, and relying safely upon them made by said Morgan of the contracts purport, and effect of said conveyance or assignment. And these defendants further aver that after the death of said Morgan, to wit, on the 1st day of May, 1869, the said Rumford Chemical Works revoked said license or assignment, dated February 1st,
97 1869, and refused to allow the representatives of said Morgan, and particularly the said plaintiff, Mrs. Kate G. Payne, to carry on said business under said agreement, and refused to allow defendants to carry out their agreement made with said Allen F. Morgan as aforesaid, and so informed these defendants. And afterwards, to wit, on the 1st day of May, 1869, the said Rumford Chemical Works, by its written assignment or agreement, dated May 1st, 1869, did sell, assign, and convey to these defendants the exclusive right to manufacture, use, and sell for the term of five years, to wit, until the 1st day of May, 1874, the article known as self-rising flour from cereals by the use of Horsford's patent pulverulent phosphoric acid, in certain territory therein described, the same being the territory in the agreement in the declaration mentioned, dated February 1st, 1869. And defendants aver that it was under and by virtue of this agreement or assignment from the Rumford Chem-
98 ical Works that all the said supposed grievances mentioned in the declaration were by them committed. And defendants aver that they, the said defendants, were induced to enter into said agreement, dated February 1st, 1869, and were induced to commit all said supposed grievances complained of in said declaration by the said acts of said Morgan, and his admissions that said assignment, dated January 1st 1866, and February 1st, 1869, were revocable at any time by said Rumford Chemical Works. And therefore these defendants aver that said plaintiffs are estopped by said acts and admissions of said Allen F. Morgan as aforesaid, and this they are ready to verify.

ESTES AND ELLETT AND
PIERCE AND DIX, *Att'ys.*

9. And for further plea the defendants say that the said Rumford Chemical Works did not on the 1st day of February, 1869, or at any other time, sell, assign, or convey to said Allen F. Morgan all its

99 rights and powers to use said supposed patent mentioned in the amended declaration, throughout the territory in said declaration described, or any part thereof, and of this they put themselves upon the country.

ESTES & ELLETT AND
PIERCE & DIX, *Att'ys.*

10. And for further plea the said defendants say that said license given by said Rumford Chemical Works to said Allen F. Morgan, on the 1st day of February, 1869, as set forth in said declaration, was, on or about the 1st day of June, 1869, by said Rumford Chemical Works annulled and revoked, and the same, or any one in its stead, was never thereafter renewed to said Allen F. Morgan's representatives, and this they are ready to verify, &c.

ESTES & ELLETT AND
PIERCE & DIX, *Att'ys.*

11. And for further plea the defendants say that the said Horsford was not the original and first inventor or discoverer of the thing pat-
100 tented, or of a substantial or material part thereof, claimed *or* new; that is to say the 3d claim as set forth in said letters patent, granted to said Horsford as set forth in the declaration was anticipated and covered by a patent issued to John Fowler, assignee of Henry Jones, the inventor, on the 1st day of May, 1849, by the Commissioner of Patents of the United States of America, in which it is specified that said invention consists in the adding to a certain weight of flour such quantities of alkalines and acids, sugar and salt, as shall by the addition of water only enable such prepared flour to be manufactured into bread without the use of fermenting matter. A certified copy of said letters patent, issued to said Fowler, assignee, &c., is herewith filed and made a part hereof.

ESTES & ELLETT AND
PIERCE & DIX, *Att'ys.*

UNITED STATES OF AMERICA,
Western District of Tennessee, ss:

101 Before me personally appeared G. M. Weston, one of said defendants, who, being duly sworn, made oath that the facts stated in the above pleas are true to the best of his knowledge, information, and belief, and that the same are not made for delay.

G. M. WESTON,

Subscribed and sworn to before me this 28th day of May, 1878.
BELL W. ETHERIDGE, *Clerk.*

102 *Demurrer to* 2, 3, 5, 6, 7, & 11 *pleas.—Filed May* 28, 1878.

In the circuit court of the U. S. at Memphis.

J. N. PAYNE ET UX.
v.
OLIVER, FINNIE & CO. } # 1916. Law docket.

DEMURRER TO 2D PLEA.

The plaintiffs demur to the second plea filed by defendants herein on the 28th May, 1878, and for cause of demurrer allege:

1st. The stat. of limitations cannot be relied on as a defense to the amended declaration. The amended declaration does not introduce an independant new cause of action. The breach or cause of action is the same in both declarations, and the amended declaration is now a part of the original.

2d. If the statute of limitations could be pleaded at all the statute of three years does not apply.

DEMURRER TO 3D PLEA.

Plaintiffs demur to the third plea filed by the defendants herein on the 28' May, 1878, and for cause of demurrer 1 & 2 the two grounds of demurrer set up to the second plea as stated above.

103 3d. That the record shows that the amended declaration was filed within 6 years from the time the causes of action mention therein accrued.

DEMURRER TO 5 & 6 PLEAS.

And plaintiffs demur to the 5th and 6th pleas of defendants filed herein May 28, 1878, by defendants, and for cause of demurrer allege:

1st. The fact that the Rumford Chemical Works have injured or infringed plaintiffs' rights, if such fact be true, affords no defence or excuse to defendants for the wrong committed by them against plaintiffs.

2d. The declaration pleaded to set up that the defendants and the Rumford Chemical Works agreed and combined together to injure and infringe the rights of plaintiffs.

DEMURRER TO 7TH PLEA.

And plaintiffs demur to the 7th plea of defendants' plea filed herein May 28, 1878, and for cause of demurrer allege:

1st. That the assignee in bankruptcy of Allen F. Morgan alone could raise the question made by this plea against plaintiffs, and the defendants have no right to set up this defence.

104 2d. The record shows that more than two years had elapsed from the time of the assignee in bankruptcy of said Morgan was appointed before that suit was brought, and there is no allegation in said plea that said assignee had ever claimed the right which is here in controversy, or had ever sued any one for its infringement.

3d. The record shows that the right or property of plaintiffs for the infringement of and injury to which the defendants are here sued is a different right and property from that mentioned in said 7th plea. Even if the Rumford Chemical Works was not the owner on the 1st February, 1869, of the exclusive right to manufacture, use, and sell in the territory described in the declaration the said article known as self-rising flour, &c., it was the owner of such right on the 1st February, 1869, of the exclusive right to manufacture, use, and sell in the territory described in

105 *in* the declaration the said article known as self-rising flour, &c., it was the owner of such right on the 1st January, 1871, and its contract with said Morgan, made in February, 1869, would, even if continued most strictly against Morgan, give him said exclusive right from

the said 1st January, 1871, up to the end of the period of the 5 years set out in the declaration.

DEMURRER TO 7TH PLEA.

Plaintiff's demurrer to the 10th plea, filed herein on 28th May, 1878, and for cause of demurrer alleges that the record shows, 1st, that the right given by said Rumford Chemical Works to said Morgan was not revocable in its nature; 2nd, this defense has been already pleaded.

DEMURRER TO 11TH PLEA.

Plaintiff's demur to the 11th plea filed herein by defendants, and on 28th May, 1878, and for ground of demurrer allege, 1st, that the
106 defense set up in this plea has already been substantially pleaded; 2d, that the record shows that the Rumford patents, described in the declaration due different from the patent described in said plea, and that the said patents do not conflict.

GANTT & PATTERSON.

H., McK. & TURLEY,
For Plaintiffs.

107 *Replication to pleas—Filed Dec.* 11, 1878.

Circuit court of the United States, western district of Tennessee.

RUMFORD CHEMICAL WORKS, FOR USE OF J. N. Payne & wife, pl't'ffs,
v.
OLIVER, FINNIE AND CO.

1st. And the said plaintiffs, as to the plea of the said defendants, by their first above pleaded on the 28th of May, 1878, and whereof they have put themselves upon the country, doth the like.

HARRIS, McKISSICK & TURLEY,
GANTT, PATTERSON & LOWE,
For Pl't'ffs.

2d. And the said plaintiffs, as to the second plea pleaded by the defendants on 28th May, 1878, say that at the time of the cause of action herein sued on occurred, the plaintiff, Kate G. Payne, to whom the cause of action really , and has so remained from that time to the present day, was a married woman, and of the, &c.

HARRIS, McKISSICK & TURLEY,
GANTT, PATTERSON & LOWE,
For Pl't'ffs.

3d. And the said plaintiffs, as to the third plea pleaded by the defendants on the 28th May, 1878, say that the cause of action sued on
108 in the amended declaration, did occur within six next before the filing of the amended declaration, and this they pray may be enquired of. And service of the court having been obtained, for further

replication they say that at the time of action occurred, plaintiff R. G. Payne, to whom the cause of action sued on really belongs, was a married woman, and has so remained from that time to the present, when, &c.

HARRIS, McK. & TURLEY,
GANTT, PATTERSON & LOWE,
For Pl'ffs.

4th. And for replication to the 4th plea by the defendants pleaded on 28th May, 1878, plaintiffs reply that they rely on the decisions of the court heretofore made on the pleadings and the other replications heretofore filed herein.

H., McK. & T.,
G., P. & L.,
For Pl'ffs.

5th. And plaintiffs, for replication to the 5th plea by the defendants pleaded on the 28th May, 1878, say that the Rumford Chemical Works did not refuse to sell to the plaintiff the article known as Horsford
109 patent pulverulent phosphoric acid, on or before the 1st April, 1870, and for a period of five years then next following, and this they pray may be enquired of, &c.

H., McK. & T.,
G., P. & L.,
For Pl'ffs.

6th. And for replication to 6th plea by defendants, pleaded at same time, plaintiffs say that the Rumford Chemical Works did not, without the request and solicitation of the defendants, hinder and prevent the other plaintiffs from manufacturing, selling, or using the article known as self-rising flour from cereals by the use of Hor*d*sford's patent pulverulent phosphoric acid in any and every part of the territory in the declaration mentioned during the time in said plea set out; and this they pray may be enquired of, &c.

H., McK. & T., G., P. & L.,
For Pl'ffs.

7th. And for replication to 7th plea pleaded by defendants on 28th May, 1878, plaintiffs say that they join issue on the same, and that
110 all the rights of said Morgan under said contract did not pass to his assignee in bankruptcy, and that the Rumford Chemical Works were, at the date of the contract mentioned in the declaration, the owner of the exclusive right therein mentioned.

H., McK. & T., G., P. & L.,
For Pl'ffs.

8th. And for replication to 8th plea by defendants pleaded on 28th May, 1878, plaintiffs reply the replication filed by them to the 9th plea heretofore pleaded by defendants on, to wit, 26th Dec., 1876.

H., McK. & T., G., P. & L.,
For Pl'ffs.

9. And for replication to the 9th plea pleaded by defendants on 28th

May, 1878, and whereof they have put themselves upon the country, doth the like.

H., McK. & T., G., P. & L.,
For Pl'ff's.

10th. And for replication to the 10th plea by the defendants pleaded on the 28' May, 1878, the plaintiffs reply the replications which they have heretofore filed to the 3d plea pleaded by the defendants herein on the 10th February, 1878.

H., McK. & T., & G., P. & L.,
For Pl'ff's.

111 11. And for replication to 11th plea by defendants pleaded herein on 28th May, 1878, plaintiffs say that the said Horsford was the original inventor of the thing patented by the patents in the pleadings described, and that said patent-right embraced in this suit was not anticipated by the patent in said 10th plea mentioned; and this they pray may be enquired of, &c.

H., McK. & T., G., P. & L.,
For Pl'ff's.

112 *Agreement of counsel.—Filed Dec.* 12, 1878.

Circuit court of the United States, western district of Tennessee.

RUMFORD CHEMICAL WORKS, FOR THE USE of Payne & Wife,
v.
OLIVER, FINNIE AND CO.

It is hereby agreed that on the trial of said cause either party may introduce as evidence, subject to exceptions as to relevancy and competency, any of the depositions, papers, exhibits, and letters used on the trial of the case of Kate G. Morgan, adm'x, v. Oliver, Finnie and Co. in the circuit of Shelby County, Tennessee, on file therein.

Dec. 12th, 1878.

HARRIS, McKISSICK & TURLEY,
Att'ys for Pl'ff.
PIERCE & DIX, *Att'ys for Def'ts.*

113 *Demurrer to replication.—Filed Dec.* 17, 1878.

Circuit court of the United States, western district of Tennessee.

RUMFORD CHEMICAL WORKS, USE OF J. N. Payne and wife, adm'x of Allen F. Morgan,
vs.
OLIVER, FINNIE AND CO.

And the said defendants as to the replication of the plaintiff's to the plea of the defendants by them secondly above pleaded say that the said replication is insufficient in law for the said plaintiff's to maintain their said action, and they demur in law thereto, and for causes of demurrer say:

1. That the fact, if it be so, that said Kate G. Morgan, adm'x of A. F.

Morgan had intermarried with J. N. Payne before the cause of action occurred, is no answer to the said second plea.

2. That said replication is in other respects informal and insufficient.

Wherefore they pray judgment, &c. And the said defendants, as to
114, 115 the said second replication of the plaintiff's to the third plea of the defendants, say that the same is insufficient in law for the plaintiffs' to maintain their aforesaid action, because they say: 1. That the fact, if it be so, that Kate G. Morgan, adm'x of A. F. Morgan, had intermarried with J. N. Payne before the cause of action occurred is no answer to the said third plea.

2. That the said second replication is otherwise informal and insufficient. Wherefore they pray judgment.

And the said defendants as to the second replication of the plaintiffs to the eighth plea of the defendants say that there is not any such record remaining in the supreme court of the State of Tennessee of any such judgment or decision as in the said second replication is alleged.

H. F. DIX, AND
ESTES & ELLETT,
For Defendants.

116 Further proceedings had, on, to wit, the 12', day of Dec., A. D. 1878, in the following cause, to wit:

PAYNE ET AL., PLAINTIFF,
vs.
OLIVER, FINNIE & CO., DEFENDANT. } No. 1916.

By agreement of counsel in open court, and for satisfactory reasons to the court appearing, this cause is set for hearing January 22d, 1879.

117 Further proceedings had on, to wit, the 6th day of Jan'y A. D. 1879, in the following cause, to wit:

RUMFORD CHEMICAL WORKS, FOR USE, &C.,
plaintiff,
vs.
OLIVER, FINNIE & CO., DEFENDANT. } No. 1916.

Came the parties by their attorneys, and thereupon defendants' demurrer, filed herein 17th December, 1878, to plantiffs' replication to defendants' 2d plea, and plaintiffs' 2d replication to defendants' 3d plea, was argued and heard by the court. The court being fully advised, and of the opinion that said demurrer is not well taken, it is therefore considered, ordered, and adjudged that said demurrer be, and the same is hereby, overruled. Defendants have three days within which to rejoin or take issue on said replication.

118 Further proceedings had on, to wit, the 22d day of Jan'y, 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE & CO., DEFENDANT. } No. 1916.

In the above cause came the parties by their attorneys, and on motion, it is ordered that a jury do come, and thereupon came a jury of good and lawful men, to wit, Joseph H. Morton, James M. Reavis, Hosea Jackson, G. S. Jordan, A. Walbrecht, W. H. Horton, Patrick Meagher, J. N. Jones, A. S. Brown, A. W. Hanna, Josiah Dickson, and Godfrey Salem, who being duly elected, tried and sworn well and truly to try the issues
119 joined in this cause, and a true verdict render according to the evidence, and thereupon the trial of said cause was commenced, and there not being sufficient time to conclude the same on to-day, it is ordered that said trial be continued till to-morrow morning at ten o'clock.

Judge Brown did not sit in this case.

120 Further proceedings had on, to wit, the 23 day of Jan'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

Came again the parties by their attorneys, and came also the jury heretofore empannelled in the said cause, and thereupon the trial of the same was resumed, and there not being sufficient time to conclude said trial on to-day, it is ordered that the same be continued till to-morrow morning at ten o'clock.

121 Further proceedings had on, to wit, the 24th day of Jan'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

Came the parties again, by their attorneys, and came also the jury heretofore empannelled in the said cause, and thereupon the trial of the same was resumed, and there not being sufficient time to conclude said trial on to-day, it is ordered that the same be continued till to-morrow morning at ten o'clock.

122 Further proceedings had on, to wit, the 25' day of Jan'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

The further hearing of this cause is continued till Monday morning next at ten o'clock.

123 Further proceedings had on, to wit, the 27th day of Jan'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

The further hearing of this cause is continued till to-morrow morning at ten o'clock.

124 Further proceedings had on, to wit, the 28' day of Jan'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

The further hearing of this cause is continued till to-morrow morning at ten o'clock.

125 Further proceedings had on, to wit, the 29 day of Jan'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

The further hearing of this cause is continued till to-morrow morning at ten o'clock.

126 Further proceedings had on Jan'y 30, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE AND CO., DEFENDANTS. } No. 1916.

The further hearing of this cause is continued till to-morrow morning at ten o'clock.

127 Further proceedings had on, to wit, the 31 day of Jan'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No. 1916.

The further hearing of this cause is continued till Monday morning next, at ten o'clock.

128 Further proceedings had on, to wit, the 3' day of Feb., A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No.

The further hearing of this cause is continued till to-morrow morning at ten o'clock.

129 Further proceedings had on, to wit, the 4' day of Feb., A. D. 1879, in the following cause, to wit:

J. N. PAYNE & WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE & CO., DEFENDANT. } No.

The further hearing of this cause is continued till to-morrow morning at ten o'clock.

130 Further proceedings had on, to wit, the 6' day of Feb'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE & WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No.

The further hearing of this cause is continued till to-morrow morning a' ten o'clock.

131 *Bill of exceptions.*

In the circuit court of the United States, western district of Tennessee.

RUMFORD CHEMICAL WORKS FOR THE USE
J. N. Payne and wife,
v.
OLIVER, FINNIE AND CO. } Bill of exceptions.

Be it remembered that on the trial of said cause at the November term, 1878, the following evidence was then submitted to the jury:

1. The plaintiffs introduced copy of letters patent No. 14722, issued to E. N. Horsford, April 22, 1856, as follows:

165.

DEPARTMENT OF THE INTERIOR.

United States Patent Office to all persons to whom these pre'nts shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent and certificate of extension granted Eben

Norton Horsford, dated April 22, 1856, No. 14722, for imp't in
132 preparing phosphoric acid, as a substitute for other solid acids.

In testimony whereof I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and second.

[L. S.] W. H. DOOLITTLE,
Acting Commissioner.

No. 14722.

United States of America to all to whom these letters patent shall come:

Whereas Eben Norton Horsford, of Cambridge, Mass., has alleged that he has invented a new and useful improvement in preparing phosphoric acid as a substitute for other solid acids, which he states has not been known or used before his application; has made oath that he is a
133 citizen of the United States, that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose: These are therefore to grant, according to law, to the said Eben Norton Horsford, his heirs, administrators, or assigns, for the term of fourteen years from the twenty-second day of April, one thousand eight hundred and fifty-six, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Horsford in the schedule hereto annexed, and is made part of these presents.

134 In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand, at the city of Washington, this twenty-second day of April, in the year of our Lord one thousand eight hundred and fifty-six, and of the Independence of the United States of America the eightieth.

ROBERT McCLELLAND,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

[SEAL.] S. T. SHUGERT,
Act'g Commissioner of Patents.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, Eben Norton Horsford, of Cambridge, in the county of Middlesex and State of Massachusetts, have invented a new and improved preparation or substance, being a substitute for a pulverulent acid, for

135 use in manufactures of soda powders and other similar compounds where a dry acid is required, and I do hereby declare that the following is a full and exact description thereof and of the mode of its preparation. Carefully washed and burned bones after being finely ground, are sifted, with continual stirring into freshly diluted oil of vitriol in the following proportions: 500 lbs. of bone ash, 400 lbs. of oil of vitriol, and 1,000 lbs. of water. The mass is stirred from time to time for three days, when ordinarily the action will be complete, and there will have resulted phosphoric acid, superphosphates, and sulphate of lime, with a small proportion of salts of magnesia and soda. The pasty mass may be mixed with flour or starch or any farinaceous substance, while moist, and permitted slowly to dry in the sun, or with the aid of artificial heat, not above 150° Fah., or it may be mixed with freshly burned gypsum, and then

136 dried in the sun or by artificial heat, or it may be mixed with stearine, or other fatty bodies and dried, or the mass may be leached and the concentrated extract mixed with burned gypsum or stearine, and dried, all of which I have found to give desirable results, but the method, which on the whole is to be preferred, is the following: The pasty mass is leached and the extract concentrated to 25° Beaumé in an evaporating pan of cast-iron lined with porcelain, or other proper vessel. Ten gallons of this liquor are heated up to boiling, and four pounds of perfectly white bone ashes added, and the boiling continued till the whole is reduced to a little less than half its original bulk, when the concentrated liquid mass containing in solution the added bone ashes becomes pasty. The hot mass is then transferred to a convenient vessel to cool overnight. In the morning following add to this concentrated

137 pasty mass 76 lbs. of wheaten flour, which is to be mixed to an uniform paste. Then add 16 lbs. of potatoe starch and most carefully mix again, after which it should turn out friable or in a state of division, such that it may be passed through a sieve with quarter inch meshes. If not sufficiently dry it may be spread out a short time in the sun, or in a room heated to 120° Fah.

The sifted mass should then be brought to a drying chamber and spread out in trays until it becomes brittle at a temperature of from 115° to 120° Fah., when the heat may be raised to from 130° to 150° Fah. and continued till the mass is thoroughly dried. When dried the preparation should be packed in close boxes or barrels to prevent the absorption of moisture. The proportions of the agents employed may be varied somewhat without essentially affecting the result. Corn starch and other farinaceous substances, as rice flour or farina, may be substituted for wheaten flour

138 and potatoe starch; bone black may be used instead of burned bones. The object is to obtain available phosphoric acid in such form that it may be intimately mixed with dry alkaline carbonates, or other sensitive chemical compounds without decomposing them or entering into combination with them, except upon the addition of moisture or the application of artificial heat. This requires that the acid or acid phosphates be mixed with a neutral diluting agent, as flour or starch, to increase the extent of surface that the action may be prompt when moisture or heat is applied, and at the same time to more or less invest the particles of acid to prevent them from action on contact while dry. Prepared as above described, the article is white or greyish-white, coarse grained, may be

readily pulverized, and, with water, may be stirred to an emulsion.
139 It is exceedingly sour to the taste, but does not act when mixed with dry alkaline carbonates without the addition of water or the application of heat. As a dry, brittle powder, the article has the advantages of a pulverulent acid, may be handled, weighed, stirred, &c., as tartaric acid, or cream tartar, and as a substitute for these and a variety of similar pulverulent acids and acid salts has ma'y uses in manufactures. It may, among other uses, be mixed with dry alkaline carbonates (carbonate of potassa or carbonate of soda), and remain in this state without evolution of carbonic acid until moistened or heated, thus making it a substitute for cream tartar and tartaric acid in the preparation of yeast powder or baking powder. The acidified mixture prepared in accordance with the foregoing specification, I have called "pulverulent phosphoric acid," and I claim this "pulverulent phosphoric acid" for neutralizing
140 alkaline bases and producing carbonic acid at will, from a mixture of this pulverulent acid with alkaline carbonates, upon the addition of moisture or heat or both.

E. N. HORSFORD.

In presence of—
CHAUNCEY SMITH.
WILLIAM T. RICHARDSON.

Ex'd, F. F. H. M. L.

Extension for seven years.

Whereas upon the petition of E. N. Horsford, of Cambridge, Massachusetts, for the extension of the patent granted to him April 22, 1856, reissued May 7, 1867, and again reissued June 9, 1868, for an "Improvement in pulverulent acid for use in the preparation of soda powders, farinaceous food and other purposes," the undersigned, in accordance with the 18th section of the act of Congress approved the 4th day of July, 1836, entitled "An act to promote the progress of the useful arts, and to repeal all acts and parts of acts heretofore made for that purpose," and the act approved the 27th day of May, 1848, entitled "An act to
141 provide additional examiners in the Patent Office, and for other purposes," did, on this 12th day of April, 1870, decide that said patent ought to be extended.

Now, therefore, I, Samuel S. Fisher, Commissioner of Patents, by virtue of the power vested in me by said acts of Congress, do renew and extend the said patent and certify that the same is hereby extended for the term of seven years from and after the expiration of the first term, viz, from the 22d day of April, 1870. Which certificate being duly entered of record in the Patent Office, the said patent has now the same effect in law as though the same had been originally granted for the term of twenty-one years.

In testimony whereof, I have caused the seal of the Patent Office to be hereunto affixed, this 12th day of April, 1870, and of the Independence of the United States the ninety-fourth.

[L. S.] SAMUEL S. FISHER,
Commissioner.

Ex'd, H. M. H. E. A. M.

142 (65.)

Reissue No. 2597.

DEPARTMENT OF THE INTERIOR.

United States Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the reissue letters patent granted "The Rumford Chemical Works," dated May 7, 1867, No. 2597, for "Imp't in the manufacture of phosphoric acid."

In testimony whereof I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-sixth day of January, in the year our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and second.

[L. S.] W. H. DOOLITTLE,
Acting Commissioner.

Reissue No. 2597.

The United States of America to all to whom these letters patent
143 shall come:

Whereas the Rumford Chemical Works of Providence, Rhode Island, assignees by mesne assignments of E. N. Horsford, have alleged that said E. N. Horsford invented a new and useful improvement in the manufacture of phosphoric acid and phosphates for use in the preparation of food for other purposes (for which letters patent were issued to him, dated April 22nd, 1856, which letters having been surrendered by said assignees, the same have been cancelled, and new letters ordered to issue to them on an amended specification) which he stated have not been known or used before such invention; had made oath that he was a citizen of the United States, that he verily did believe that he was the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; said as-
144 signees having paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents, praying that a patent may be issued therefor, these are therefore to grant, according to law, to the Rumford Chemical Works, their successors or assigns, for the term of fourteen years from the twenty-second day of April, one thousand eight hundred and fifty-six, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the said improvement, a description whereof is given in the schedule hereunto annexed, and made a part of these presents. In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office to be hereunto affixed. Given under my hand at the city of Washington, this seventh day of May, in the year of our Lord one
145 thousand eight hundred and sixty-seven, and of the United States of America the ninety-first.

W. T. OTTO,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

[L. S.] T. C. THEAKER,
Commissioner of Patents.

UNITED STATES PATENT OFFICE:

The Rumford Chemical Works of Providence, Rhode Island, assignees by mesne assignments of Eben Norton Horsford. Letters patent No. 14722, dated April 22, 1856, reissue No. 2597, dated May 7, 1867. Improvement in the manufacture of phosphoric acid and phosphates for use in the preparation of food and other for purposes.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that Eben Norton Horsford, of Cambridge, in the county of Middlesex, and State of Massachusetts, has invented a new and
146 improved preparation or substance, being a substitute for pulverulent acid for use in manufactures of soda powders and other similar compounds where an acid is required; and it is hereby declared that the following is a full and exact description thereof and of the mode of its preparation: Carefully washed and burned bones, after being finely ground, are sifted with continual stirring into freshly diluted oil of vitriol in the following proportions: five hundred pounds of bone ash, four hundred pounds oil of vitriol, and one thousand pounds of water. The mass is stirred from time to time for three days, when ordinarily the action will be complete, and there will have resulted phosphoric acid, superphosphates, and sulphate of lime with a small porportion of salts of magnesia and soda. The pasty mass must be mixed with flour or
147 starch, or any farinaceous substance, while moist, and permitted slowly to dry in the sun, or with aid of artificial heat not above 150° Fahrenheit, or it may be mixed with freshly burned gypsum, and then dried in the sun or by artificial heat, or it may be mixed with stearine or other fatty bodies and dried, or the mass may be leached, and the concentrated extract mixed with burned gypsum or stearine and acid; all of which have been found to give desirable results; but the method which, on the whole, is to be preferred is the following: The pasty mass is leached, and the extract concentrated to 25° Baumé, in an evaporating pan, of cast-iron, lined with porcelain, or other proper vessel. Ten gallons of this liquor are heated up to the boiling , and four pounds of perfectly white bone ashes added, and the boiling continued till the
148 whole is reduced to a little less than half its original bulk, when the concentrated liquid mass containing in solution the added bone ashes, becomes pasty. The hot mass is then transferred to a convenient vessel to cool overnight. In the morning following add to this concentrated pasty mass seventy-six pounds of wheaten flour, which is to be mixed to a uniform paste. Then add sixteen pounds of potatoe starch, and most carefully mix again, after which it should turn out firable or in a state of division, such that it may be passed through a sieve with quarter-inch meshes. If not sufficiently dry, it may be spread out a short time in the sun or in a room heated to 120° Fahrenheit. The sifted mass should then be brought to a drying chamber and spread out in trays until it becomes brittle, at a tem-

perature of from 115° to 120° Fahrenheit, when the heat may be
149 raised to from 130° to 150° Fahrenheit, and continued till the mass is thoroughly dried. When dried the preparation should be packed in close boxes or barrels, to prevent the absorption of moisture. The proportions of the agents employed may be varied somewhat without essentially affecting the results. Corn starch and other farinaceous substances, as rice flour or farina, may be substituted for wheaten flour and potato starch; bone-black may be used instead of burned bones. The object is to obtain available phosphoric acid in such form that it may be intimately mixed with dry alkaline carbonates or other sensitive chemical compounds, without decomposing them or entering into combination with them, except upon the addition of moisture or the application of artificial heat.
150 This requires that the acid or acid phosphates be mixed with a neutral diluting agent or flour or starch, to increase the extent of surface, that the action may be prompt when moisture or heat is applied, and at the same time to more or less invest the particles of acid to prevent them from action or contact while dry. Prepared as above described the article is white or greyish white, coarse grained, may be readily pulverized, and, with water, may be stirred to an emulsion. It is exceedingly sour to the taste, but does not act when mixed with dry alkaline carbonates; without the addition of water or the application of heat, as a dry, brittle powder, the article has the advantages of a pulverulent acid, may be handled, weighed, stirred, &c., as tartaric acid or cream tartar, and, as a
151 substitute for these, and a variety of similar pulverulent acids and acid salts, has many uses in manufactures. It may, among other uses, be mixed with dry alkaline carbonates (carbonate of potassa or carbonate of soda), and remain in this state without evolution of carbonic acid until moistened or heated; thus making it a substitute for cream tartar and tartaric acid in the proportion of yeast powder or baking powder. The acidified mixture, prepared in accordance with the foregoing specification, is called by the inventor "Pulverulent phosphoric acid." The acid agent which this preparation places in available condition is phosphoric acid, as tartaric acid is the available acid agent in cream tartar, and this is used as a substitute for tartaric acid or cream tartar to decompose alkaline carbonates in the well-known process of making bread,
152 cake, &c., without the use of ferment or leaven. It may be well to add that the substance produced and used in substantial accordance with this invention, yields phosphates of lime and the alkalies, which are important constituents of human food, and which are in great degree removed from the flour in the process of bolting; and thus the nutritious qualities of which it has been deprived are restored to the flour, and in general terms the various forms of farinaceous food are enriched with phosphates at the same time and with the same agents that are provided for as a substitute for ferment or leaven. What is claimed as the invention of the said E. N. Horsford is:

1. The mixing, in the preparation of farinaceous food, with flour, of a powder or powders, such as described, consisting of ingredients, of which phosphoric acid or acid phosphates and alkaline carbonates are the active agents, for the purpose of liberating carbonic acid, as described,
153 when subjected to moisture or heat, or both.

2. The use of phosphoric acid or acid phosphates, when employed

with alkaline carbonates, as a substitute for ferment or leaven in the preparation of farinaceous food.

In testimony whereof the said company, by E. N. Horsford, its president, has affixed its signature before two subscribing witnesses.

RUMFORD CHEMICAL WORKS,
By E. N. HORSFORD, *President.*

Witnesses:
M. BAILEY.
CHAS. G. PAGE, Jr.

(65.)

Reissue to Rum. Ch. W'ks, June 9, 1868.

Second reissue.

DEPARTMENT OF THE INTERIOR.

United States Patent Office, to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office, of the reissue letters patent granted the Rumford Chemical Works, dated June 9, 1868, No. 2979, for imp' in pulverulent
154 acid for use in the preparation of soda powders, farinaceous food, and for other purposes.

In testimony whereof I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and second.

[L. S.] W. H. DOOLITTLE,
Acting Commissioner.

No. 2979. Reissue.

The United States of America, to all to whom these letters patent shall come:

Whereas the Rumford Chemical Works, of Providence, Rhode Island, assignees by mesne assignments of E. N. Horsford, have alleged that said E. N. Horsford invented a new and useful improvement in pulverulent acid for use in the preparation of soda powders, farinaceous food, and for other purposes (for which letters patent were issued to him,
155 dated April 22, 1856, the same surrendered and new letters issued to said assignees, dated May 7, 1867, which last letters having been surrendered by them, the same have been cancelled and new letters ordered to issue to them on an amended specification), and had made oath that he was a citizen of the United States, that he did verily believe he was the original and first inventor or discoverer of the said improvement, and that the same hath not to his knowledge and belief been previously known or used has paid into the Treasury of the United States; the sum of thirty dollars, and presented a petition to the Commissioner of Patents praying that a patent may be issued therefor. These are, there-

fore, to grant to the said The Rumford Chemical Works, their successors or assigns, for the term of fourteen years from the twenty-second day of April, one thousand eight hundred and fifty-six, the full and exclusive right and liberty of making, using, and vending to others to be
156 used, the said improvement, a description whereof is given in the annexed schedule, and made a part of these presents.

In testimony whereof I have caused these letters to be made patent and the seal of the Patent Office to be hereunto affixed. Given under my hand, at the city of Washington, this ninth day of June, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-second.

W. T. OTTO,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

[L. S.]

A. M. STOUT,
Acting Commissioner of Patents.

UNITED STATES PATENT OFFICE.

The Rumford Chemical Works, of Providence, R. I., assignees, by mesne assignments, of Eben Norton Horsford. Improvement in pulverulent acid for use in the preparation of soda powders, farinaceous food, and for other purposes. Specification forming part of letters patent No. 14722, dated April 22, 1856; reissue No. 2597, dated May 7,
157 1867; reissue No. 2979, dated June 9, 1868.

To all whom it may concern:

Be it known that Eben Norton Horsford, of Cambridge, in the county of Middlesex and State of Massachusetts, has invented a new pulverulent acid for use in the preparation of soda powders, farinaceous food, and for other purposes, and it is hereby declared that the following is a full and exact description thereof and of the mode of its preparation: Carefully washed and properly burned bones, after being ground, are put into freshly-diluted oil of vitriol, with continued stirring, and in the following proportions: Five hundred pounds of the above described ground bones (sometimes called bone-ash), four hundred pounds of oil of vitriol, and one thousand pounds of water. These ingredients are stirred from time to time for about three days, when, ordinarily, the action will be
158 completed, and the result and products will be phosphoric acid, superphosphates, and sulphate of lime, or gypsum, with a small proportion of salts of magnesia and soda, in a paste-like mass, which may be mixed with flour or starch, or any farinaceous substance, while moist, in order more readily to render it pulverulent, and to dilute the same, and permitted to dry slowly in the sun, or with aid of artificial heat not above 150° Fahrenheit, and pulverized; or it may be mixed with freshly-burned gypsum and then dried in the sun or by artificial heat and pulverized; or it may be mixed with stearine or other fatty bodies and dried and pulverized; or the mass may be leached, and the concentrated extract mixed with burned gypsum or stearine, and dried and pulverized, or it may be dried and pulverized without admixture, all of which modes have been found to give desirable results; but the method which, on the

159 whole, I prefer is the following: The above described resultant products or paste-like mass is leached and the extract concentrated to 25° Baumé, and thereby I obtain a solution consisting of phosphoric acid and acid phosphate of lime, with slight traces of other salts substantially freed from the gypsum or sulphate of lime produced by the action of the oil of vitriol on the bone in an evaporating pan of cast-iron, lined with porcelain or other proper vessel. Ten gallons of this liquor are heated to boiling, and four pounds of perfectly white bone-ash added, and the boiling continued till the whole is reduced to a little less than half its original bulk, when the concentrated liquid mass, containing in solution the added bone-ash, becomes pasty. The hot mass is then transferred to a convenient vessel to cool overnight. In the morning following add to this concentrated pasty mass seventy-six pounds of wheaten flour, which is to be
160 mixed to a uniform paste; then add sixteen pounds of potato starch, and most carefully mix again; after which it should turn out friable, or in a state of division, such that it may be passed through a sieve with quarter-inch messes. If not sufficiently dry it may be spread out a short time in the sun, or in a room heated to 120° Fahrenheit. The sifted mass should then be brought to a drying chamber, and spread out in trays until it becomes brittle, at a temperature of from 115° to 120° Fahrenheit, when the heat may be raised from 130° to 140° Fahrenheit and continued till the mass is thoroughly dried. When dried the preparation may be pulverized, and then packed in close boxes or barrels to prevent the absorption of moisture. It will be obvious to any practical chemist that the above-described processes of producing this pulverulent
161 acid may be modified in different ways. The proportions of the agents employed may be varied somewhat without materially affecting the result. If a smaller proportion of sulphuric acid is employed, the white ground bones may be diminished. Bone-black may be used instead of white burned bones if the resultant product or pasty mass made therewith is leached; corn-starch and other farinaceous substances, such as rice flour or farina, may be substituted for wheat flour and potato starch. The object is to obtain phosphoric acid in such form, that is, a pulverulent powder, so that it may be intimately mixed with dry alkaline carbonates, or other sensitive chemical compounds, without decomposing them or entering into combination with them, except upon the addition of moisture or the application of artificial heat. This requires that the phosphoric acid, or acid phosphates, be mixed with some neutral agent, as flour or
162 starch, gypsum, &c., so that action of the acid shall be prevented while dry, and shall, when moisture or heat is applied, be prompt, thorough, and equally diffused. Prepared as above described, the article is white or greyish white, coarse grained, and may be readily pulverized. This body, with water, may be stirred to an emulsion. It is exceedingly sour to the taste, but does not act when mixed with dry alkaline carbonates, without the addition of water or the application of heat. As a dry, brittle powder, the article has the advantages of a pulverulent acid, may be handled, weighed, stored, &c., as tartaric acid or cream tartar; and, as a substitute for these and a variety of similar pulverulent acids and acid salts, it has many uses in manufacture. It may, among other uses, be mixed with dry alkaline carbonates, carbonate of po-
163 tassa, or carbonate of soda, and remain in this state without

evolution of carbonic acid until moistened or heated, thus making it a substitute for cream tartar and tartaric acid in the preparation of yeast powder or baking powder. I am aware that acid phosphates have been used as fertilizers, but because of the method pursued in their manufacture, their coarseness, dark color, and offensive impurities, they were totally unfit to be used in the preparation of food. I am also aware that acid phosphates and phosphoric acid, in a liquid or more or less viscid condition, have been prepared in the laboratory of the chemist, but neither of these forms of phosphoric acid or acid phosphates possessed the properties essential to the purpose for which I design to employ them. The body which I have invented and above described is a form of acid phosphate of lime, or of mixed acid phosphate of lime, and phos-
164 phoric acid is the active and valuable constituent, free from the objectionable qualities of the above mentioned bodies. It is a dry, white, or nearly white, homogeneous powder, unobjectionable on account of odor, taste, or composition, is an essential and important element in healthful nutrition, and is suited to be employed as the acid ingredient in the preparation of self-rising farinaceous food. In order to make the article possessing these qualities, and suited to this office, it is necessary that a powder should be made which can be not only evenly comminuted and diluted, but one which shall have so little affinity for the moisture of the atmosphere that it may be mixed with flour and bicarbonate of soda in the practical preparation of self-raising flour. Although liquid and viscid, or more or less pasty or tough, phosphoric acid and acid phosphates were known as incidental forms in the preparation of various bodies
165 of which phosphorous was a constituent, they were not pulverulent, nor were the means of making them so known. The manufacture I have invented accomplishes these results. To illustrate the importance of these qualities, it may be stated that a vial of liquid phosphoric acid cannot be used as an ingredient of yeast or baking powders. To meet the wants I have contemplated, the phosphoric acid must be a dry, fine, homogen'ous powder, white, or nearly white, and unobjectionable on account of smell, or taste, or healthfulness. It must be a dry powder, to permit it to be mixed with flour and bicarbonate of soda, and not evolve carbonic acid prematurely. If sticky it would mix unequally, and if moist it would at once act on the bicarbonate of soda to decompose it and set free carbonic acid. It must be a fine powder, in order, so to speak, that, with proper distribution, each
166 minute quantity of flour may be brought into juxtaposition with a particle of acid and a particle of bicarbonate of soda, so that upon the application of moisture the carbonic acid of the bicarbonate of soda shall be so uniformly liberated throughout the entire mass of the dough that it shall secure a uniform finely porous structure throughout the loaf. It must be a homogeneous powder, that is, all particles must have a like acidity in order that the decomposition of the alkaline carbonates shall be uniform, and thus prevent portions of the bread from becoming dark colored, heavy, and alkaline by the action of undecomposed bicarbonate, while certain other portions may become sour on account of uncombined acid. That the preparation must be objectionable on account of color, taste, and smell is obvious. Its healthfulness, its freedom from poisonous ingredi-
167 ents, such as sulphate of lead (which is a constant ingredient in the

oil of vitriol employed in the manufacture, and which must of necessity be especially removed), is indispensable. My invention accomplishes all these results. By means of these results I have been enabled to avail myself of the valuable properties of phosphoric acid as an ingredient in the raising of bread without fermentation, and thereby to restore to the flour the phosphates which are, to a great degree, lost in removing the bran in the process of bolting, and which are normal and essential elements of healthful food. The acidified mixture above described as acid phosphate, or acid phosphate and free phosphoric acid, I have called "pulverulent phosphoric acid." The acid agent which this preparation places in
168 available condition is phosphoric acid, as tartaric acid is the available acid agent in cream tartar, and this is used as a substitute for tartaric acid or cream tartar to decompose alkaline carbonates, as stated above, in the well-known process of making bread, cake, &c., without the use of ferment.

1. I claim, as a new manufacture, the above-described pulverulent phosphoric acid.

2. I claim the manufacture of the above-described pulverulent phosphoric acid, so that it may be applied in the manner and for the purposes above described.

3. I claim the mixing, in the preparation of farinaceous food, with flour, of a powder or powders, such as described, consisting of ingredients of which phosphoric acid, or acid phosphates and alkaline carbonates, are the active agents for the purpose of liberating carbonic acid, as described, when
169 subjected to moisture or heat, or both.

4. The use of phosphoric acid or acid phosphates, when employed with alkaline carbonates, as a substitute for ferment or leaven in the preparation of farinaceous food.

In testimony whereof I, Eben N. Horsford, president of the Rumford Chemical Works, have hereunto affixed my signature in presence of two witnesses.

E. N. HORSFORD,
President Rumford Chemical Works.

Witnesses:
A. POLLOK,
HENRY REDFIELD.

(65.)

DEPARTMENT OF THE INTERIOR.

United States Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of an assignment recorded in liber E 13, page 271, and
170 that said annexed copy has been compared by me with the original, and that it is a correct transcript therefrom and of the whole of the original.

In testimony whereof I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this second day of February, in the year of our Lord one thousand eight hun-

dred and seventy-eight, and of the Independence of the United States the one hundred and second.

[L. S.] W. H. DOOLITTLE,
Acting Commissioner.

Liber E 13, p. 271.

Whereas I, Eben N. Horsford, of Cambridge, in the county of Middlesex and State of Massachusetts, did obtain certain letters patent, and extension of certain letters patent of the United States for certain inventions and improvements in the manufacture and use of phosphoric acid and acid phosphate of lime, which letters patent bear date and are numbered as hereafter stated; and whereas the Rumford Chemical Works, a
171 corporation doing business in the town of East Providence, county of Providence and State of Rhode Island, is desirous of aquiring an interest therein: Now, this indenture witnesseth that for and in consideration of the sum of one hundred and forty-five thousand dollars, to me in hand paid, the receipt of which I hereby acknowledge, I have assigned, sold, and set over, and do hereby assign, sell, and set over unto the said Rumford Chemical Works, all the right, title, and interest which I have in the said invention, as secured to me by said letters patent, for and in the United States; the same to be held and enjoyed by the said Rumford Chemical Works for its own use and behoof, and for the use and behoof of its successors and assigns, to the full end of the term for which said letters patent are granted, and for the term of any extension thereof, as fully and entirely as the same ever have been held and enjoyed by me, or ever would have been, had this assignment and sale not
172 made; and the said aforementioned patents and extension were granted for the following described purposes, and are numbered and dated as follows, viz: No. 87850, dated March 16, 1869, for use of salt of potassa when mixed with phosphoric acid or acid phosphate, in the preparation of farinaceous food; No. 2979, extension of patent granted April 22, 1856; reissued May 7, 1867, and again reissued June 9, 1868; extended 7 years from April 22, 1870. Improvement in pulverulent acid for use in the preparation in soda powder, farinaceous food, and for other purposes.

In testimony whereof I hereunto set my hand and affix my seal this twenty-first day of May, 1870.

E. N. HORSFORD. [SEAL.]

Signed, sealed, and delivered in the presence of—
HENRY F. DURANT.

[5. 5. 5. 5.]

Recorded Aug. 10, 1870.

Ex'd. H. M. H. E. A. M.

173 *License.*

To all people to whom these presents shall come the Rumford Chemical Works, a corporation transacting business in East Providence, in the State of Rhode Island, sends greeting:

Know ye that the said corporation, in consideration of the agreement

of even date herewith, entered into by and between it and Allen F. Morgan, of Memphis, in the county of Shelby and State of Tennessee, does hereby sell, assign, and transfer unto the said Allen F. Morgan the right to use, within the territory described in the said agreement, Horsford's patent cream of tartar substitute, for the purpose of manufacturing within said territory self-raising cereal flours, with the right to use and sell the flours so manufactured. To have and hold and exercise such right within the limits aforesaid for and during the time and under and subject to the conditions and limitations named and specified in the agree-
174 ments aforesaid of even date herewith, to which reference is hereby made as a part hereof.

In testimony whereof the said corporation have caused these presents to be signed, and its corporate seal to be hereunto affixed, on this first day of February, A. D. eighteen hundred and sixty-nine, by George F. Wilson, its treasurer and agent, for this purpose duly authorized.

GEO. F. WILSON, *Treas'r.* [L. S.]

Signed, sealed, and delivered in the presence of—
WILLIAM S. LYON.

Contract & agreement.

To all men to whom these presents shall come:

Know ye that because the Rumford Chemical Works, a corporation located at and doing business in the town of East Providence, in the State of Rhode Island, has licensed and granted unto Allen F. Morgan, of the city of Memphis, county of Shelby, and State of Tennessee, the exclusive right to manufacture, sell, and use, during the time of five years
175 from the date hereof, the article known as self-raising flour, from cereals by the use of Horsford's patent pulverulent phosphoric acid, in the following described territory, to wit: Beginning at the point where the northern boundary of the State of Tennessee touches the Mississippi River; thence southerly along the said river to and including Vicksburg; thence easterly along the line of the Mississippi Southern R. R. to Jackson; thence northerly along the line of Mississippi Central R. R. to Grenada; thence northeasterly to the junction of the eastern boundary line of Alabama with the southern boundary line of Tennessee; thence along the eastern boundary line of Middle Tennessee (so called) to the northern boundary line of Tennessee, and thence westerly along said boundary line to the point of beginning, by an instrument in writing, bearing even date herewith, which is made a part of this agreement, and because
176 of other good and sufficient reasons moving him thereto, that he has agreed, and by these presents does covenant and agree to and with the aforesaid Rumford Chemical Works, that he will immediately commence the manufacture of self-raising flour, in accordance with the written instructions furnished by the said Rumford Chemical Works, as to proportions and quantity of flour, and that he will use all his business tact and skill, and all other means necessary to introduce and sell the same, and to make the sale thereof as large as in any way possible in the territory aforesaid, during the continuance of the license aforesaid and no longer, and to sell the said self-raising flour nowhere but in the territory

specified, except upon the written consent of the said Rumford Chemical Works. And I further agree to accept, in the aforesaid license, such rights as are covered by the patents granted to Eben N. Horsford, and by him assigned to the said Rumford Chemical Works, and to main-
177 tain them at my own expense and cost in suits at law whenever it shall be, in my judgment, necessary so to do, and to avail myself of such advice, counsel, and assistance as the said Rumford Chemical Works may elect to give in said suits, and to purchase all of the acid used in making our said self-raising flour of the Rumford Chemical Works, or of their agents, as directed, and that in case of failure to perform the covenants and agreements hereby entered into, it shall be lawful for the said Rumford Chemical Works to annul and revoke their said license to me, and to terminate this agreement The use of phosphoric acid by families for domestic purposes shall not be construed as a violation of this agreement. In testimony whereof the party hereto has hereunto affixed his hand and seal this first day of February, A. D. 1869.

ALLEN F. MORGAN. [SEAL.]

[5. 5. 1st Feb., 1869. 5. A. F. Morgan. 5.]

Signed, sealed, and delivered in the presence of—
Att.: J. P. FINNIE.

178 *Letter of O., F. & Co. to Dwight & Co.*

MEMPHIS, TENN., *April* 20, 1869.

Messrs. JOHN DWIGHT & CO., *New York:*

GENTS: It is with pain and deep sorrow that we inform you of the death of Allen F. Morgan. After a short sickness he expired on yesterday morning. Although our connection with him in the preparation of self-rising flour has been short, yet we had found in him a faithful and honest man, one highly esteemed by all who knew him. Our Mr. Oliver is now absent from the city, but we suppose he informed you of the nature of our contract with Mr. Morgan. The contract expires April 1, 1870. We expect to continue the manufacture of said flour, but some questions may arise with Mrs. Morgan as to how she stands in relation to further transactions during the continuance of our contract. We desire to hear from you, stating what effect his death has on the contract, and in what relation we stand with Mrs. Morgan in regard to it. We desire to favor her in any way we can regarding it, and give her full credit for all bene-
179 fits due her, but desire your advice as to just how we both stand in the matter. Your early reply will oblige,

Yours, respectfully,

OLIVER, FINNIE & CO.

P. S.—Our doubt in the matter is as to whether Mrs. Morgan holds the right to manufacture after the decease of her husband, or who does.

Filed with me as a part of witness' deposition, and as the paper referred to by him in said deposition as Exhibit K.

G. W. C.

180 Mrs. KATE G. PAYNE testified as follows:

I am one of plaintiffs. I was the wife of Allen F. Morgan. He died April 19, 1869. He carried on the self-raising flour business with Oliver, Finnie & Co. Mr. Oliver was absent from the city when he died. Mr. Finnie came to see me several times, and when Mr. Oliver returned he came. He soon after started for New York; when he returned he came to see me, and said I had no right to the business; that he had been on to New York and got the right. He offered to give me $1,000.00. I charged him with having taken the business away from me. He said, "We have to look out for ourselves." I afterwards wrote to the defendants; my letter is dated August 2d, 1869, and on same day I received their reply. On the 3d of May, 1869, I wrote to John Dwight & Co., and received their reply, written on the 8th. The business had been so
181 well advertised by Mr. Morgan that it needed no more advertising. I married my present husband, J. N. Payne, on the 28th of April, 1874. The defendants prevented me from carrying on the business. They had the machinery and everything at their store. I made no efforts to carry it on, except by application to the plaintiffs, as stated, and to John Dwight & Co., who refused to let me have it, after Oliver had been on to New York, as shown by their letter of May 8th, 1869.

Plaintiffs offered and read the letter of Kate G. Morgan to John Dwight & Co., dated May 8, 1869, as follows:

MEMPHIS, *May 3d*, 1869.

JOHN DWIGHT, Esq.:

DEAR SIR: I have just learned, through the receipt of a letter to Oliver, Finnie & Co., that you say the right of the self-rising flour reverts back to you from the date of Mr. Morgan's death. Now, Mr. Dwight, he sacrificed his life for that business, and it was his dying wish that I should
182 carry that business on. I am aware that Mr. Morgan owes you $2,447.33, and I most assuredly intend paying you every cent provided you let me continue the business. As it is, if you demand it I will pay you $1,000 in cash within 60 days. As far as establishing the business is concerned, it is already established. Morgan's self-rising flour is known far and near; it is a household word. If the name is withdrawn, which it certainly will be if it is not allowed to be continued as it is, the flour will certainly lose its reputation. Mr. Morgan has hosts of influential friends that are willing and will do anything to assist me in that his last wish. Oliver and Finnie are perfectly willing for the business to go on just as it was before Mr. Morgan's death; at least they tell me they are, and if they were not there is plenty of business houses in Memphis that would be more than glad to do just what they are doing. Mr. Dwight, my husband had all confidence in you, and thought you would do what
183 was right by his wife and children. I understand more about the business than any one else, as I have always assisted Mr. Morgan. There is nothing to prevent its success, as his last visit to Nashville established it well there. It is well known throughout his territory, as he has spent all that's been made in three years in advertising it. I would like to hear from you as soon as convenient.

Respectfully,

KATE G. MORGAN.

The letter of John Dwight & Co. to Kate G. Morgan, dated May 8th, 1869, as follows:

EXHIBIT E.

NEW YORK, *May 8th*, 1869.

MRS. KATE G. MORGAN, *Memphis, Tenn.:*

MADAM: Your favor of the 3d inst. came duly to hand. With every sympathy for your peculiar situation, we have not the power to comply with your request; and if we had we should not feel justified in
184 doing so, because we should be doing you an injury instead of a benefit. We are only agents for the proprietor of Horsford's patents, and he expressly reserves the right to revoke the license at any time. You would therefore be entirely in his power. This thing is not like the assignment of a patent; there is no absolute right conveyed, and no power of assigning such a right if there had been one. You are under a delusion as to the value of the business. We have had several years' experience in it, and there is scarcely one of the numerous licenses which we have granted which has paid anything to the grantee. We assure you that we are now out of pocket to the amount of twenty thousand dollars and upwards, in the form of debts such as that Mr. Morgan owed us. Did Mr. Morgan ever make money by the business? If he had your circumstance would be very different. The building up of such a
185 business requires a large outlay of time, money, and labor, such as it would be impossible for you to undertake, and even then the result is uncertain. The S. R. flour requires constant and persevering effort to keep it going; the slightest relaxation tells upon the sales; the profit is small, and it will only pay when the aggregate sales are very large. We are certain you could not conduct the business personally, and if you employed others the necessary disbursements in salaries, &c., would eat up the profits. It would take a capital of not less than ten thousand dollars, and even that would be insufficient to do such a business as would leave a surplus of profits. Our duty to our principals requires us to consult their interests first, and our own and others are secondary to theirs. Viewed in this light, we see no other course than to place the business in the hands of Oliver, Finnie & Co., who have the capital and the facilitjes for carrying it on.

Yours, very respectfully,

JOHN DWIGHT & CO.

186 MEMPHIS, TENNESSEE, *August 2d*, 1869.

Messrs. OLIVER, FINNIE & Co., *Memphis:*

GENTLEMEN: I write to ask you to reconsider your refusal to allow me to carry out my late husband's contract with you, of 15th February last, in relation to the self-rising flour. I am still able and anxious to carry out his part of the contract, and I wish to be enjoying the benefit of it. If you will reflect dispassionately upon the matter, I think you must come to the conclusion that I am entitled to the benefits secured to him in the contract, particularly as I am his administratrix. Please let me know at once what your final conclusion is.

Very respectfully,

MRS. ALLEN F. MORGAN.

187 *Letter of O., F. & Co. to Mrs. Morgan.*

MEMPHIS, TENN., *August 2d*, 1869.

MRS. KATE G. MORGAN, *Memphis, Tenn.:*

MADAM: Yours bearing date this morning just at hand. In answer will say we have no communication to make on the subject referred to.

Very resp't'ly,

OLIVER, FINNIE & CO.

This letter was handed to me by Mr. J. P. Finnie, of Oliver, Finnie & Co., this day, Aug. 2, 1869, and was delivered at once by me to Mrs. G. Morgan. It is in reply to one of same date from her to them, delivered by me Aug. 2, 1869, 11 o'clock a. m.

C. M. COOPER.

The witness further testified that her letter to Oliver, Finnie & Co. of Aug. 2, 1869, was written by her attorney, Col. Wm. H. Stephens.

188 J. L. MORGAN testified as follows:

I was a brother of Allen F. Morgan, and worked for him until the last part of 1867 or first of 1868 in the self-rising flour business. It took 45 minutes to make a barrel of flour, self rising. After mixing acid and flour it did not have to be left any time to dry. The mill had to be turned 15 minutes each way, and it took about 15 minutes to put it in and take it out. Morgan sold the prepared flour at $4.00 a barrel more than the unprepared sold for. Morgan had two mills. I saw them in Oliver, Finnie & Co.'s store after his death. He was owing some debts when he died. I don't know that he was engaged in outside speculations.

W. A. HARVEY testified:

I have been a merchant at Memphis; was formerly of Eli, Harvey & Richardson; have had occasion to buy self-rising flour; bought of Morgan, and since that time of defendants. A prepared barrel sells for
189 $3.00 or $4.00 more than the unprepared. The demand was not heavy. We sent for it when we had orders.

The plaintiffs offered in evidence the contract between Allen F. Morgan and Oliver, Finnie & Co., dated February 15th, 1869, to which the defendants objected, upon the ground that it was irrelevant, which objection was overruled by the court, to which the defendants then and there excepted. The same was then read as follows:

Contract.

[Int. rev. stamp, 2. 2. 2.] [2. 2. Rev. int. stamp, 2. 2.] [2. 2. Rev. stamp, 2. 2.]

This agreement is entered into by and between Allen F. Morgan, of the city of Memphis, county of Shelby, and State of Tennessee, of the first part, and Jos. N. Oliver, Jas. P. Finnie, and G. M. Weston, partners together in business, under the firm name of Oliver, Finnie & Co., all of the city of Memphis, county of Shelby, and State of Tennessee, of the second part. The agreement between the aforesaid parties *the agreement be-*

tween the aforesaid parties is for the purpose of having prepared in
190 connection with the grocery business of the parties of the second part what is known as self-rising flour, by the party of the first part, under and by authority of the exclusive privilege granted to the party of the first part, for preparing said flour by the Rumford Chemical Works, a corporation situated and doing business in the town of East Providence and State of Rhode Island. The party of the first part agrees to furnish the necessary flour-preparing mills, all tools, fixtures, and implements needed by himself with which to prepare said flour in a complete and proper manner, and in such quantities as the trade or sale of same may demand; also to furnish his own time and supervision of the business, and in case of absence to fill his place with a competent man, who shall be wholly acceptable to the parties of the second part; also to furnish at his own expense all the labor or laborors he may require in the business; also to keep himself possessed of the right to prepare such flour and
191 have the privilege of purchasing the ingredients for the same; and to defend his right in suits at law, at his own expense; also to be ready to prepare all flour offered by the parties of the second part (which it is here agreed by all the parties to this contract, that the party of the first part shall be allowed at his option or discretion to refuse to prepare any flour thus offered by the parties of the second part, which in his judgment is not of sufficient good quality to maintain the good character and popularity of the flour) and put it in any of the following size packages, as demanded by the parties of the second part, to wit, whole and half barrels, forty-eight (48), twenty-four (24), twelve (12), and six (6) pound packages. The parties of the second part agree to furnish at their own expense all the flour and buckwheat flour (of acceptable quality
192 to the party of the first part) that may be demanded by the sale or trade for said self-rising flour and buckwheat. Also to furnish all the ingredients used in the preparation of the said flour and buckwheat. Also all the cotton and paper bags and sacks required. Also all fuel and lights needed or required by the said flour business; to furnish ample room in the rear part of store No. 284 Main street, in which to do the work of preparing said flour, said room to be free of rent to the party *to the party* of the first part. Also to pay each and every license, tax, or assessment on such business made by United States or Tennessee State governments, or by the county of Shelby or city of Memphis. Also to keep at all times during the continuance of this agreement, the machinery, tools, implements, &c., belonging to the party of first part, insured in a good and solvent insurance company, for five hundred dollars ($500), said insurance to be paid for by the parties of the second part, and in case
193 of their destruction or damage by fire or its consequences, the said insurance money shall be paid over to the party of the first part by the parties of the second part immediately upon its collection from the insurance company. The parties of the second part specially agree that they will not severally, jointly, or individually, or through other party or partis, or in any manner become competitors or bidders against said party of the first part for his exclusive right to prepare self-raising flour with Eben N. Horsford's patent cream tarter substitute, at the assignee's sale of same in the bankrupt case of the party of first part, or in any other way or manner whatsoever. The parties of the second part further agree

to advertise said flour well and liberally at their own expense, and to do all in their power and means to advance the demand for and sale of the self-rising flour, and to pay to the party of the first part for each and
194 every barrel of wheat flour and buckwheat flour purchased by him or under his right the sum of one dollar and twenty-five cents ($1.25). This agreement is entered into by all the parties to it, to remain in full force and operation till the first (1st) day of April, eighteen hundred and seventy (1870), but it is further agreed that should any change occur before that date in the present firm of Oliver, Finnie & Co., involving the addition of or the retirement of a partner to or from said firm, this contract from the date of said change shall become null and void and of no force. Signed in duplicate, and subject to such additions and amendments as shall hereafter be mutually agreed to and entered upon both sheets of this agreement, and over the signatures of all the parties to this agreement. Signed in presence of these witnesses this 15th day of February, 1869.

OLIVER, FINNIE & CO. [SEAL.]
ALLEN F. MORGAN. [SEAL.]

Attest:
W. S. FRITH.
J. F. BUCKLAM.

[2. 2. U. S. int. rev. stamp. 2. 2.] [2. 2 U. S. int. rev. stamp, 2. 2.] [2. 2. U. S. int. rev. stamp, 2. 2.]

195 *Depo. of Ware.—Filed May* 3, 1876.

The plaintiffs then offered and read the deposition of G. A. H. Ware, as follows:

In the United States circuit court for the western district of Tennessee.

J. N. PAYNE & WIFE, PL'T'FFS,
v.
OLIVER, FINNIE & CO., DEFENDANTS.

It is agreed that the following questions and cross-questions may be forwarded to Chappel Hill, Texas, to G. A. H. Ware, and there answered by him before any officer having the power under the laws of Texas to administer an oath, and that the formal caption and certificate of such officer shall be sufficient. When answered the said officer may return the questions and answers to H. E. Andrews, clerk of the United States courts at Memphis, Tenn., and the said deposition may be read at the trial of this cause on behalf of the plaintiffs, subject only to exceptions for competency and relevancy.

Caption.

196 The deposition of G. A. H. WARE, a witness for the plaintiffs, in the suit of J. N. Payne & wife vs. Oliver, Finnie & Co., pending in the circuit court of the United States, 6th judicial circuit, western district of Tennessee, taken before me upon the above interrogatories, at

Chappell Hill, W. Co., Texas, on the 26th day of April, 1876, in presence of the witness and officer taking the same, and no other witness.

T. M. OWENS,
J. P. & N. P. of Co., Texas.

1. Q. What is your age, where do you reside, and what is your present occupation?

(Page 1.) To 1st interrogatory the witness says: I will be twenty-nine on the 8th of May of this year, and reside near Chappell Hill, in Washington Co, Texas; my occupation at present is that of a student at law.

2. Q. Did you know Allen F. Morgan in his life-time, and do you know the defendants Oliver, Finnie & Co.?

As to 2d Q. I was well acquainted with Allen F. Morgan dur-
197 ing his life-time, and also knew Mess. Oliver, Finnie & Co.

3. Q. Did you ever reside in Memphis; and, if so, were you at any time while living in Memphis in the employment of said Allen F. Morgan while he was engaged in the business of manufacturing self-rising flour?

As to 3d Q. I lived in Memphis a little over three years, and was in the employment of Mr. Morgan shortly after I came to that city.

4. Q. If you say you were in the employment of Allen F. Morgan, state how long you were employed by him, during what year or years, and what kind of work you did for him.

As to 4th Q. I entered Mr. Morgan's employment either during the month of February or March, in 1869; I do not remember positively which, but I think the former, and was in his service up to the time he died. I was his agent, and the instructions he gave me were to
198 look after his interests and keep an account of the number of barrels and quality of flour mixed daily, which I entered in a book kept for the purpose; also to make report of the same to his wife daily when he was absent, and to inform him by letter weekly of the condition of the business. The physical work I did for him was to mix the ingredients used in the manufacture of the self-rising flour.

5. Q. How many other persons were in his employ while you were working for him?

As to 5th Q. Two negroes named, respectively, "Wash and Squire," the former black, and the latter a "saddle colored" mulatto.

6th Q. About how many barrels of "Morgan's self-rising flour" did Mr. Morgan manufacture on an average per week, say, while you were working for him, and at what price did it sell?

To 6th Q. I cannot say positively, but to the best of my knowledge and belief, about forty-eight barrels, sometimes more, and occasionally
199 less, though not often. Some weeks we would mix as many as ninety barrels, and once in awhile ninety-six. (This part of my evidence should be open to correction, however, on account of the varied and exciting life I have led since then, although I solemnly believe my answer to your question is correct.) The flour sold at prices varying from ten to fourteen dollars per barrel, varying according to brand, "The Stonewall Jackson," "R. E. Lee," and another brand, I think "The Mayflower," or some such name, being the finest and most in demand. Some of my reports are probably in the hands of Mrs. Morgan, now Payne, and others, and others may be in the possession of Mr. Weston, the bookkeeper and

treasurer of the firm of Oliver, Finnie & Co., who was the "company" of the house bearing that name.

7th Q. What was the difference in the price of an ordinary bar-
200 rel of flour after it was changed or manufactured into the self-rising flour?

As to 7th Q. Ordinarily, about four dollars; Mr. Oliver did the purchasing for the house, and their best qualities of flour usually cost them at that time seven and a half dollars per barrel by the hundred, and I never knew the firm to purchase less than a hundred barrels at a time. The common flour was purchased in the same way, and sold for seven and eight dollars per barrel, the original or first cost of the mills being from four to five dollars, and sometimes as low as three and a half dollars per barrel. The profits were about the same, whether XXXX or common quality, the former however being more in demand.

8. Q. Was the self-rising flour in demand; and was it sold as fast as manufactured?

As to 8th Q. Yes, sir.

9. Q. Were you in Mr. Morgan's employ at the time of his death?
201 As to 9th Q. I was, and conversed with him until within a few hours before his death.

10. Q. What was the condition of the business while you were with Mr. Morgan; was it growing and increasing or not; had Mr. Morgan taken or wished tak*ing* any steps to extend and increase it; and, if so, state what he had done or was doing in that direction, and give in full the prospects of the business at the time Morgan died—answer this question as fully as you can.

As to 10th Q. The business was increasing. Mr. Morgan talked with me very freely concerning his business, and as his health was very delicate, suffering as he did from pulmonary consumption, relied on me to represent him while away. He contemplated establishing a branch of his business in Nashville, where he designed that I should go, with the under-
202 standing that I was to receive one hundred dollars a month for my services and salary, to be increased in the same proportion as the business. The steps he had taken in that direction was to make arrangements for that purpose with some prominent grocers in that city, whose names, however, I have forgotten. He wrote me regularly from Nashville, and I preserved his letters, some of which I think I gave his widow, and others were destroyed when my library was burned in Canton, Mississippi, in the year 1872.

11. Q. What was the capacity of the machinery which Morgan had for manufacturing or mixing the flour—that is, how many barrels could be mixed on it in a day or week when run or worked to the highest limit?

As to 11th Q. The machines were worked by hand-power, and I think about eight barrels each, which made sixteen for the two. We
203 could easily have mixed one hundred barrels in the course of a week by running them steadily.

12th Q. How many barrels did Morgan ordinarily mix per week while he was manufacturing it for Oliver, Finnie & Co.?

As to 12th Q. My impression is between forty-eight and ninety-six, or about seventy-two barrels.

13. Q. Did you remain in Oliver, Finnie & Co.'s employ after Morgan's death?

As to 13th Q. I did, for perhaps three weeks, but as they only offered me fifty dollars a month for so doing, quit. That was what Mr. Morgan paid me, but he promised me one hundred dollars that fall, when I was to have gone to Nashville, and agreed to give me seventy-five to remain in Memphis through the summer.

14. Q. What became of Morgan's machinery and mills after his death?

A. to 14th Q. The machinery remained in the possession of Oliver, Finnie & Co., who increased the business and size of room in
204 which the self-rising flour was made.

15. Q. Did Oliver, Finnie & Co. continue to manufacture the self-rising flour after Morgan's death? If they did, state what attention they gave to the business, and also state who superintended it.

A. to 15. Q. They did, and I showed Mr. Finnie how to mix the ingredients for making the flour self-rising. He then instructed the negro "Wash," who superintended that department under Mr. Finnie himself, who managed the sales' department and occasionally went back to look after "Wash" and the self-rising flour.

Cross-interrogatories:

1. Qu. State fully what your occupation has been and where you have resided since you were last in the employ of Oliver, Finnie & Co., giving the dates and time you were at different places and in different callings.

G. A. H. Ware's answers to cross-interrogatories of counsel for defendants.

205 A. to 1 X Q. My occupations have been various, and although I remember them all, cannot give the precise time to the very day and hour, having no memoranda to refer to. After leaving Oliver, Finnie & Co., I entered the service of the Memphis City R. R. Company, as assistant treasurer, and remained with it until the latter part of December of that year. In January, 1870, I accepted a situation as clerk of the steamer "Lewellyn," commanded by Capt. Les. J. Ware, of Memphis, and we ran between Memphis and Evansville, Indiana, first, and then changed our trade and run regularly as an independent packet between Memphis and Nashville. After the Lewellyn passed into other hands, I went on the steamer Commercial, which was in the Memphis and Evansville trade, also running as an independent packet. On this boat I served as head
206 freight clerk; but my health failing, again quit work and went to the Ozark Mountains in Missouri, where I remained five months. This was in September, 1870. I left Arcadia, Iron County, Missouri, the place I had been stopping at, in February, 1871, and at the solicitation of Col. George W. Alexander, the superintendent of the Memphis City Rail Road, *and* went to work for the street R. R. again, not as an officer, however, this time, but as a starter. My business was to regulate the running of the cars. In May of the same year, Mr. William M. Farrington, the president, assigned me to duty in the office of the company as acting treasurer of that institution, in which capacity I continued to serve until the annual election in June, of that year. The secretary and myself still continued, however, to discharge the functions of our old offices until
207 my successor resigned, and another was chosen to take his place, when I left for New Orleans. In February, 1872, I left New Orleans for Texas, where I traveled around looking at the country until my money gave out, when I set to work as a laborer in a brick-yard for a man by

the name of John L. Reese, then living on Goose Creek, in Harris County, Texas. This was in the month of March, 1872, and believing myself destined for something better, went immediately to Houston, in search of employment more congenial to my taste and inclinations; I was a perfect stranger there and didn't have a cent of money, but I stopped at the Old Capital Hotel, and putting on congressional airs soon formed the acquaintance of a couple of nurserymen from St. Louis, and in the course of two or three days was employed by them to canvass the State in their inter-
208 est at a stated salary of seventy-five dollars per month and expenses. From Texas I went to Louisiana and Mississippi for them. In the fall and winter we made our delivery of trees and shrubbery, and in January, 1873, I quit the house on account of a difficulty I had with a fellow agent from Ohio, with the understanding I would return when he was discharged. During the month of May I resumed my work as a traveling agent for the same parties with the understanding that I was to get one-half interest in my sales, I defraying my individual expenses and the house the expenses of stock, &c. In August of that year, I think about the 22d, I went to Des Moines, Iowa, to engage in the selling of school furniture for A. S. Vorse & Co. In October, I came to Brownsville, Tennessee, and from thence afterward left for New Orleans.
209 This was in January, 1874. On the 22d of March, I left that city for Florida, whence I sold fruit trees and shrubbery as an agent for W. & T. Smith, nurserymen of Geneva, N. Y. In August I again returned to Tennessee and stopped at Brownsville, where I assisted in editing a democratic newspaper until March or April, 1875, when I left for Senatobia, in Tate Co., Mississippi. Here I remained until June, when I started for Texas on foot. I reached this State the 28th of August, and on the 16th of September of last year, commenced the study of the law under General John Sayles of Brerham, and am at it still. I live near Chappell Hill, but recite in Brerham, the county seat of Washington.

2. X Q. If in answer to 3d question you say you worked for Morgan, please state how much he paid you for your services?

A. to 2 X Q. Mr. Morgan paid me fifty dollars a month, with the
210 understanding that he would give me one hundred dollars when I went to Nashville in the fall to establish a branch of the business for him, for which he had already made arrangements with some good house in that city.

3. X Q. What did said Allen F. Morgan do while you were at work for him, that is, what part of the self-rising flour business did he attend to, and did he not give that business his whole attention; if not, what other business had he?

A. to 3 X Q. He gave his chief attention to the self-rising flour business, that is, in a general sort of a way, but I attended to the detailed part of it in Memphis. If he had any other business I was not knowing to it, or if so, it has escaped my mind entirely. Mr. Morgan's health was so bad he could not give his personal attention to anything in particu-
211 lar. He was suffering with pulmonary consumption when we first met, and that was one reason why he employed me.

4. X Q. How many men were in the employ of Mr. Morgan at the time of his death besides yourself, and give their names?

A. to 4th X Q. There were two negroes named, respectively, Wash and Squire, the former black and the latter a saddle-colored mulatto.

5th X Q. How long had you been at work for Mr. Morgan at the time he died?

A. to 5th X Q. I do not know exactly when Mr. Morgan did die, only that year; but I was in his service from early in February or March, 1869, until that time.

6th X Q. Did you keep any memorandum of the number of barrels of flour manufactured by Mr. Morgan, so that you can state accurately how many barrels he manufactured per week; if not, are you certain that you can now state the number?

A. to 6 X Q. I kept a memorandum, but gave it to Mr. Morgan
212 daily, and also reported verbally to Oliver, Finnie & Co. What papers I had of Mr. Morgan's were turned over to his widow, or Oliver, Finnie & Co., who paid her (Mrs. Morgan) a royalty for the privilege of continuing the business. I would not be positive as regards the number of barrels manufactured per week, but to the best of my knowledge and belief between forty-eight and ninety-six barrels per week. The average I should think about seventy-two barrels. The book of Oliver, Finnie & Co. together with some of my reports in Mrs. Morgan's, now Mrs. Payne's, possession, would show the correct number.

7th X Q. If you answer in reply to quest. 8, that it was sold as fast as manufactured, state how you know that fact. Do you know whether it was sold or sent out to agents and country merchants to be sold on commission?

213 A. to 7th X Q. The flour was sold generally as fast as manufatured, and in the same way as the other groceries, and this I know through what the firm told me; I do not mean to say by this that O., F. & Co. talked with me about their business affairs generally, only that department of which I had control.

8th X Q. Do you know how much it cost to manufacture a barrel of self-rising flour; that is, the cost of making it "self-rising," as Morgan did; if yea, state how much it cost, and give fully the items of expenses?

A. to 8th X Q. The ingredients cost about sixty-five cents per barrel. The negro men received two dollars per day as wages. So that counting the wear and tear of machinery, together with hire of hands and employees' wages generally, I should say it would cost about a dollar and a quarter to make a barrel of flour "self-rising."

9th X Q. How long were you with Mr. Morgan? Were you
214 with him long enough to know what his *his* business amounted to? How many barrels per week did he manufacture when you were first employed by him, and how many just previous to his death?

A. to 9th X Q. I was with Mr. Morgan sufficiently long to have known all about his business, and he conversed with me freely concerning it, but it has been so long ago I would not like to be too positive. The books of O., F. & Co., and papers in possession of Mrs. Morgan, widow, now Mrs. Payne, will give the number; but to the best of my knowledge and belief I should say about forty-eight, rapidly increasing to ninety-six barrels, and averaging about seventy-two.

10th X Q. Did Mr. Morgan employ more help for the month next preceding his death than he did when you commenced working for him; and, if so, state how many persons were added to his force, and give the names of those employed at both of said dates?

A. to 10th X Q. He did not.

215 11th X Q. Do you know anything about the prospects of the business at and before Morgan's death, except what he told you? If yea, state fully all you know about it, and how you derived your information.

A. to 11th X Q. I do not, only through the firm of O., F. & Co.; they were delighted with the prospect, and thought Mr. Morgan and they had a good thing of it between them, and *and* the substance of their conversation with me on this subject amounted to about that.

12th X Q. Did you ever work the machinery mentioned in question 11 to its highest capacity? If yea, how much flour was mixed a day or week?

A. to 12th X Q. No, sir; my impression is their working capacity would depend upon the motive power; by hand they would easily mix one hundred barrels in a week if the work was steadily carried on.

13th X Q. Were there not two machines or mills, one for mixing wheat flour and one for buckwheat flour?

216 A. to 13th X Q. There was one machine for mixing buckwheat, and either one or two for flour; I cannot say positively, but I think two. When we mixed buckwheat the man Squire run that mill.

14th X Q. Is it not a fact that, after Morgan's death, Oliver, Finnie & Co. employed more hands, and paid more attention to the business than Morgan had and did during his life-time?

A. to 14th X Q. With regard to this question I cannot answer positively; I happened in Memphis several times, and called in to see Oliver, Finnie & Co. merely for "old times'" sake, and Mr. Finnie very cleverly took me back in the self-rising flour department of the store, and showed me how he had enlarged his business, especially in the branch of which I formerly had charge. I do not think, however, that the number of hands in this department was increased, only the work and demand for the self-rising flour.

15th X Q. Have you ever received any letters from the plaintiffs
217 in this suit, or either of them, relating to this case; if yea, state when they were received, and file them with your deposition.

A. to 15 X Q. I received letters from the attorneys of plaintiff and from the defendants themselves, asking me to keep them posted of my whereabouts, as they wished to get my deposition in the case now pending; to both of which I replied in the affirmative. I cannot state the exact time, however, but the letter of O., F. & Co. was received in 1872, while I was in Houston, Texas, and that *at* the other party this year at Chappell Hill, where I am now living. Mr. Finnie's letter was destroyed with my library in Canton, Mississippi, during a tornado in the fall of the same year. The other letter has been misplaced, but the sum and substance was in effect the same.

16th X Q. Is it not a fact that nearly all the flour manufactured by Mr. Morgan while you were with him, except what was sold at Oliver, Finnie & Co.'s store, sent out to country merchants and other persons to be sold on commission?

218 A. to 16th X Q. No, sir; I think not; my impression is that the self-rising flour had such an established reputation that it was not necessary to resort to such means in or*o*rder to dispose of it. I know

it went like hot cakes in Memphis, and the towns in Mississippi, also it much sought after. Mess. O., F. & Co. were reliable merchants, and Mr. Morgan was also well known, and the best of flour was used in the manufacture of this particular sort, and hence, I repeat with emphasis that if the flour was sold on commission I was not cognizant of the fact.

17. X Q. Do you know whether any of the flour sent out to be sold on commission was ever sold; if yea, how do you know it?

A. to 17th X Q. I cannot answer this question more than to say Mr. Morgan and Mess. Oliver, Finnie & Co. told me such was the case, but to what extent, and the result of their efforts to introduce it in that way, I know not.

18th X Q. Did not Mr. Morgan spend most of his time outside the store endeavoring to introduce it?

219 A. to 18th X Q. He did; but had a large business established before he set in with O., F. & Co., and in spending his time outside of the house was only endeavoring to rebuild that which had fallen. At the time of Mr. Morgan's death, and when I left the house, as I said before, this particular business was increasing.

I, G. A. H. Ware, do solemnly swear that I am the witness to whom the foregoing interrogatories are addressed, and that the answers hereinbefore made and given to the fifteen direct and eighteen cross-interrogatories, contained in the twenty-two numbered and foregoing pages, are true and correct to the best of my knowledge and belief. So help me God.

G. A. H. WARE.

THE STATE OF TEXAS,
Washington County:

I hereby certify G. A. H. Ware, whose name is attached to the foregoing oath, personally appeared before me, and in my presence signed the same, and that said oath was administered by me to the
220 said G. A. H. Ware, in due form. To certify which I herewith sign my name and affix my official seal, at my office in Chappel Hill, in said county and State, this the 26th day of April, A. D. 1876.

[L. S.] J. M. OWENS,
Justice of Peace & Notary Public
for Washington County & State of Texas.

Certificate to deposition.

I hereby certify that the foregoing depositions were taken before me, as stated in the caption, and reduced to writing by G. A. H. Ware, of Chappell Hill, Texas; that I am not interested in the said cause, nor of kin or counsel to any either of the parties thereto; and that I have sealed the said depositions and deposited them in the post-office at Chappell Hill, addressed to the clerk of the said court at Memphis, Tennessee, they not having been out of my possession or altered since they were taken.

Witness my hand and seal this the 26th day of April, 1876.

221 J. M. OWENS, [SEAL.]
J. P. & N. P. W. Co., Texas.

Plaintiffs read the deposition of George Harris, as follows:

J. N. PAYNE AND WIFE,
vs.
OLIVER, FINNIE & Co. } 1916.

The deposition of George Harris, taken by consent of parties at the office of Harris, McKissick & Turley, in the city of Memphis, on the 18' March, 1876, to be read in evidence on the trial of this cause on behalf of plaintiffs.

All exceptions, save as to competency and relevancy, are waived.

222 1. Q. Did you know Allen F. Morgan in his life-time?
Ans. I did.

2. Q. *Dou'* know Oliver, Finnie & Co.?
Ans. I do.

3. Q. About how old are you; and how long have you lived in Memphis?

Ans. I am about forty-seven years old; and I have lived in Memphis; I have been living in Memphis about eight years.

4. Q. Did you ever work for Allen F. Morgan; and, if so, state what sort of work you did for him?

Ans. Yes; I worked for Mr. Morgan, in his life-time; Mr. Morgan was engaged in the business of making self-rising flour in this city. He employed me to do general work for him; I carried the flour round to customers, part of the time; after that, I worked the machine for mixing the flour, and was his foreman over the hands he employed in manufacturing the flour, and I did any kind of work in the business which came to hand.

5. Q. When did you commence working for Mr. Morgan?

223 Ans. I commenced working for him about a year after I came to Memphis, and about three weeks, as well as I can recollect, after he commenced the business of manufacturing self-rising flour.

6. Q. State how Mr. Morgan manufactured or fixed up his self-rising flour.

Ans. He had a hand-mill, with a hopper to it; ordinary flour, with the proper ingredients were put in certain proportions in the hopper, and then run through the mill; after going through the mill it went into a bolt, and from the bolt into a drawer; from the drawer it went into a tray, and from that it was put into sacks or packages, and when in these packages it was ready for delivery.

7. Q. How many hands did Mr. Morgan employ when you first went with him?

Ans. He employed about three hands; that is, a clerk and two hands to work about the mill and factory.

8. Q. How did he deliver his flour when he first commenced?

Ans. We used to roll it round in wheel-barrows.

9. Q. About how much did he make per day when you first started work with him?

224 He mixed about four *of* five barrels a day.

10. Q. How long did Mr. Morgan continue to carry his flour around in wheel-barrows?

Ans. He continued carrying around in that way for may be about a year;

after that he began to increase his business, and he got a horse and small wagon, and after that he got two mules and a large wagon to deliver it.

12. Q. Did he increase in the number of barrels he made a day.

Ans. Oh, yes, sir.

13. Q. About how much was his average number of barrels after he got his business started?

Ans. As well as I can recollect, he mixed from twelve to thirteen barrels a day; sometimes he mixed more and sometimes less. The highest I ever recollect his having mixed was once when the river froze over, and then one day we mixed about forty (40) barrels; on that we worked till nine o'clock at night.

14. Q. Did Mr. Morgan sell the flour as fast as he made it or not;
225 or how was this?

Ans. His sales kept up very well with the amount he manufactured. He hardly ever had any on hand.

15. Q. Did Mr. Morgan ever mix flour for parties who furnished their own flour so as to make it self-rising flour?

Ans. He did.

16. Q. What did he charge for that?

Ans. If any one furnished him the flour he would mix it and furnish ingredients and charge four (4) dollars per barrel.

17. Q. Did he do much work of that sort?

Ans. Sometimes he did; grocery merchants would sometimes send in flour to be mixed up.

18. Q. How long did you work for Mr. Morgan?

Ans. I worked for him, I think, about seven years; I worked for him till he died.

19th. Q. Did you work for him while he was with Oliver, Finnie & Co.?

Ans. I did.

20. Q. About how many barrels were mixed per day on an average after he went with Oliver, Finnie & Co.?

226 Ans. About ten or twelve barrels a day, as well as I can remember, on an average, sometimes more sometimes less.

21. Q. How did the business do after he went with Oliver, Finnie & Co.; was it increasing any?

Ans. I don't know that it increased any after about the time he got it started well; then he got sick and died. After going with Oliver, Finnie & Co. he went to Nashville to sell the flour. The first order he sent back was for twenty barrels; when he sent it he sent word he would have another one for fifty soon, but before he got this he was taken sick and came home and died.

22. Q. After Mr. Morgan got his business started well in Memphis how many hands did he then employ?

Ans. His working force was about five employees; this is, a clerk and four hands employed in mixing and fixing the flour; on very times he would have more.

Q. 23. What wages did he pay the hands in the factory who run the mill and mixed up the flour, &c.?

227 Ans. Some nine and some ten dollars a week.

24. Q. Did you work for Oliver, Finnie & Co. after Mr. Morgan's death in making the self-rising flour. If so, state for how long.

Ans. I did; I think about three years.

Reserving all exceptions as to relevancy and competency, defendant's attorneys cross-examine:

1. Qu. You are a colored man, are you not?

Ans. Yes.

2. Q. Can you read or write?

Ans. No, sir.

3. Q. What part of the work did you do while you worked for Mr. Morgan as stated?

Ans. I worked as a laboring man, turned the wheel, put up flour in sacks, and did anything that came up?

4. Q. When and where did you last see Mrs. Payne, formerly Mrs. Morgan?

Ans. I saw her at her house to-day.

5. Qu. How came you to go to her house to-day?

228 Ans. She left word last week for me to came and see her.

6. Qu. How much did Mr. Morgan owe you at the time he died?

Ans. Thirty-seven dollars.

7. Qu. Has it ever been paid?

Ans. No, sir.

8. Qu. Did Mrs. Payne ever promise to pay you that if you would come and testify?

Ans. Yes, sir; she promised to pay me the debt soon after Mr. Morgan's death. She did not say anything about my testifying in court then. I did not mean to say that she promised to pay the debt if I would come and testify, but that she promised to pay the debt, and that was shortly after Mr. Morgan died.

9. Qu. Did you not tell Mr. Oliver, of Oliver, Finnie & Co., at their store about two years ago, while you were at work for that firm, that Mrs. Payne had promised to pay you the debt Mr. Morgan owed you at the time he died if you would come and testify?

Ans. No, sir; I don't recollect that at all.

229 10. Qu. May you not have told him that?

Ans. I think I did not tell him that.

11. Qu. What did you tell him about it?

Ans. I told him she owed me $37. He asked me if I thought she would pay it. I told him I thought she would pay it some of these times; that is all I recollect.

12. Qu. In your answer to question No. 7, you say Mr. Morgan employed the hands. Did he not also work?

Ans. No, sir.

13. Qu. Did he not do anything about the business. If yea, what?

Ans. Yes; he was out selling this flour. He did nothing except to attend to this business—devoted his whole time to it.

14. Qu. In answer to qu. 9, you say you mixed 4 or 5 barrels a day. Is it not a fact that some days you did not mix any?

Ans. No, sir; I don't think there was any day but what some was made.

15. Qu. How did Mr. Morgan carry his flour round when he went to carry on the business at Oliver, Finnie & Co.'s?

230 He had been carrying on the business in connection with Finnie & Buckham, who delivered it themselves; and when the new arrangement was made with Oliver, Finnie & Co. they did the same thing.

16. Qu. Do you know whether the 10 or 12 bbls. you say Mr. Morgan mixed a day after he began at Oliver, Finnie & Co.'s, was sold, or was it sent out to be sold on commission about the city or country?

Ans. I don't know how that was. I know it went out, but don't know whether it was sold as it went out, or left to be sold on commission.

17. Qu. About how many barrels per day on an average did other people send to be prepared, as you have stated in answer to qu. 16 & 17 in-chief?

Ans. I cannot tell. It was an irregular thing; some months they would send in some. Merchants would send in 4, 5, or 6 bbls. at a time; then there would be two months that none would come.

231 18. Qu. In your estimate of the number of barrels prepared a day, did you include this that was prepared for outsiders?

Ans. Yes, sir.

19. Qu. How long after you commenced work for Mr. Morgan was it that he failed in business?

Ans. About 3 years; my recollection is, on reflection, that it was about four years.

Qu. 20. How long was Mr. Morgan in business with Oliver, Finnie & Co. before he died?

Ans. I cannot tell how long it was.

Qu. 21. What year did Mr. Morgan die, and what month?

Ans. I do not recollect.

Qu. 22. How long had Mr. Morgan been with Oliver, Finnie & Co. before he went to Nashville, as you have stated?

Ans. He had been there about two (2) years.

Qu. 23. Do you know how many bbls. were manufactured by Mr. Morgan from the time he went in with Oliver, Finnie & Co. up to the time of his death; if so, how many?

Ans. I cannot give the whole number; it averaged from ten to

232 twelve bbls. a day.

Qu. 24. How do you get at that average; did you keep any account of it?

Ans. I used to mix the ingredients and keep an account of the number of barrels that went out. I do not mean that I kept any account in a book, but just in my memory. It is my recollection.

25. Qu. In your answer to qu. 21 in-chief you say Mr. Morgan sent back an order from Nashville for 26 bbls.; how do you know that?

Ans. Mr. Finnie brought the order back to the mill and read it to me.

26. Qu. Did he, Finnie, read that he, Morgan, would send another order for 50 bbls.?

Ans. The letter was as Mr. Finnie read it: "Tell Wash. (meaning me) to keep a stiff upper lip and a strong back bone, for the next order I will dispatch for 50 barrels." That letter was from Mr. Morgan, at Nashville.

27. Qu. How long after that was it that Mr. Morgan came home sick?

Ans. It was three weeks after that.

233 28th. Qu. Did the business increase any from the time he commenced at Oliver, Finnie & Co.'s up to the time of his death?

Ans. Yes, sir; I reckon it was increasing.

29. Qu. Do you know whether it was increasing?

Ans. Yes, sir; I am confident it was increasing from the orders he was getting in from Nashville.

30. Qu. How many orders did he get from Nashville, & for what amounts?

Ans. That was the amounts, 20 bbls., as above stated, and his statement that he was going to get 50 more.

31. Qu. Have you any other reason that induces you to testify that the business was increasing; if so, what is it?

Before he left he had a paper, and said to me, "Here is a paper that I would not give for all the groceries in this house. I want you to take care of yourself. I think I shall make a fortune yet. Prospects never were so good with me." This is what he, Morgan, said just before he left for Nashville.

234 (This answer is objected to by defendant's attorney.)

32. Qu. Is there anything else that makes you think the business was increasing?

Ans. No, sir; I don't know as there is anything except what I have stated.

33. Qu. How many men did Mr. Morgan have in his employ when connected with Oliver, Finnie & Co., and give their names?

Ans. I worked all the time Mr. Ware, a white man, and Squire Ewing, a colored man; they also had two other men, but I don't remember their names, two colored men; that made five in all.

Re-examined:

1. Where did Finnie & Buckham do business when Mr. Morgan went with them; did he go with Finnie & Buckham before he did with Oliver, Finnie & Co.; how long before he went to Nashville did he go with Finnie & Buckham?

Ans. They had just moved to the same house Oliver, Finnie & Co. are now in, and Mr. Morgan moved with them, he moving from the Waldran block. He was with them before Mr. Oliver succeeded Mr. Buck-

235 ham. As well as I can recollect he went with Finnie & Buckham about 3 years before he went to Nashville. In stating the number of years that elapsed between any times, I can only state my recollection as it now seems to me. I kept no memorandum, and can't be accurate. It seems to me Mr. Oliver came into the concern about a year after Morgan went with Finnie & Buckham.

Q. Did Mr. Morgan mix or manufacture any other kind of flour besides the ordinary wheat flour you have already spoken of?

Ans. He made self-rising buckwheat, and now and then relf-rising corn meal. He made the buckwheat in the fall of the year; it was not used much at any other season. He made the meal occasionally. The buckwheat was put up in packages, and, during the fall, was mixed just as it was needed. Sometimes the sale was very good for it. I don't remember whether any meal was mixed after Mr. Oliver succeeded Mr. Buck-

236 ham or not. In stating the average number of barrels of flour which

Mr. Morgan made, that is, ten, twelve, or thirteen a day, I include in it the buckwheat which was mixed. And further deponent saith not.

his
GEORGE + HARRIS.
mark.

Subscribed and sworn to before me the 18th day of March, 1876, my incompetency being waived.

HENRY F. DIX,
U. S. Commissioner, W. D. of Tennessee.

237 Plaintiffs read the letter of Jno. Dwight & Co. to Oliver, Finnie & Co., dated April 24, 1869, as follows:

EXHIBIT L.

NEW YORK, *April 24th*, 1869.

Messrs. OLIVER, FINNIE & Co., *Memphis, Tenn.:*

GENT'N: Your favor of 20th and telegram of 23d inst. both reached us this morning. It is with great regret and sorrow we learn the death of Mr. Morgan. The license reverts to us; there is no provision in it recognizing heirs, executors, administrators, or assigns. If it had been made to a firm it would continue a part of the property of the copartnership. We would of course desire that the widow should have any benefit there might justly accrue to her, but there is nothing legally due her. We wish to continue the business in your hands, and are willing to grant you a new license. You are aware that Morgan owed us nearly twenty-five hundred dollars for soda and acid supplied to him, and which he promised to make good if he should be successful, notwithstanding the
238 debt was cancelled by the operation of the bankrupt law. We would like to get back part of this money, which was all expended in establishing the business, and of which you will have the benefit under a new license. You will understand that Mr. Morgan had all the benefit of this expenditure while the expense fell upon us. The license to Mr. Morgan would have nearly four years to run after the expiration of his agreement with you. If you think you could allow Mrs. Morgan anything for the unexpired time of your agreement we can issue a license to you for five years from the present time. Let me know what you think is right about the matter, both pecuniarily and otherwise. We have made so many losses that we have yet to earn our first dollar out of the S. R. flour business.

(As per J. D. & Co.'s letter-book, p. 218.)

Yours truly,

JOHN DWIGHT & CO.

Plaintiffs read the deposition of P. M. Stanley, as follows:

239 *Depo. of Stanley.*

In the United States circuit court for the western district of Tennessee.

J. N. PAYNE AND WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE & Co.

It is agreed that the following questions and cross-questions may be

forwar'de to Little Rock, Arkansas, to P. M. Stanley & Burt Stanley, and there answered by them before any officer having the power under the laws of Arkansas to administer an oath, and that the caption and certificate of such officer to the deposition shall be sufficient. When answered the said officer may return the deposition to H. E. Andrews, clerk of the United court at Memphis, Tenn., and the said deposition may then be read at the trial of this cause on behalf of the plaintiffs, subject only to exceptions for competency and relevancy.

PIERCE & DIX,
Def'ts' Att'ys.

LITTLE ROCK, ARKANSAS,
September the 14th, A. D. 1876.

Deposition of P. M. STANLEY, taken at Little Rock, Arkansas, Sep-
240 tember 14th, 1876, before Elijah B. Thompson, a justice of the peace in and for the county of Pulaski, Ark., an officer under the laws of Arkansas, having the power to administer oaths and take depositions, in pursuance of an agreement signed at Tennessee by Pierce & Dix.

1. Q. What is your age, where do you reside, and what is your present occupation?

A. Q. 1. I am 29 years old; reside in Pulaski County, Ark., and am a farmer.

2. Q. Did you know Allen F. Morgan in his life-time, and do you know the defendants, Oliver, Finnie & Co.?

A. Q. 2. Yes, I knew Allen F. Morgan in his life-time, and I know Oliver, Finnie & Co.

3. Q. Did you ever reside in Memphis; and if so, were you at any time while living there in the employment of said Allen F. Morgan while he was engaged in the business of manufacturing self-rising flour.

A. Q. 3. I was.

If you say that you were in the employment of Allen F. Morgan, state how long you were employed by him; during what year or years,
241 and what kind of work you did for him.

A. Q. 4. About three years, as well as I can recollect; I was employed by him latter part of 1865, and years of 1866 and 1867. I watched over the hands, prepared the flour, weighed most of the ingredients for making bread, and also collected for the house part of the time; done most of any thing necessary to be done about the place.

Q. 5. Was the business of manufacturing self-rising flour profitable while Morgan was engaged in it? If you answer yes, then explain in full what the profit amounted to per barrel. Tell what the ingredients, materials, labor, &c., necessary to convert a barrel of ordinary flour into self-rising flour cost, and then what Mr. Morgan received per barrel for preparing it, and what the net profit was.

A. Q. 5. Yes, I think it was at the time. I can't for certain what the profits amounted to per barrel, but think about $2 or $2.50
242 per *lb.* when sold by barrel, but when sold in packages it was some larger I suppose. I can't tell what it costs to convert a barrel of ordinary flour into a barrel of self-rising flour, for I don't now remember. Mr. Morgan charged $4.00 for converting a barrel of ordinary

flour into self-rising flour. I don't exactly know what his profits were, for I don't remember the price of all the ingredients.

6. Q. Was the profit any greater when Mr. Morgan prepared the flour himself for the trade? If you answer yes, then explain how it was greater. Tell how the flour was prepared for the trade, in what sort of packages, and what the profit was on the packages, as compared with barrels, &c.

A. Q. 6. He might have made a little more on the package flour, but when sold by the barrel, I think the profit about the same. The flour was prepared for sale in barrels, half barrels, 48-pound packages, 24, 12, & 6 pound packages. I can't tell the profit on the packages compared with the barrels.

243 Q. 7. Was the self-rising flour in demand, and was it sold as fast as manufactured?

A. Q. 7. For the first two years it was in great demand; worked many a night until 12 o'clock to supply the demand; the third year business was dull.

Q. 8. Were you in Mr. Morgan's employ at the time of his death?

A. Q. 8. No.

Q. 9. What was the condition of the business while you were with Mr. Morgan; was it growing or increasing, or not? Had Mr. Morgan taken or was he taking any steps to extend and increase it, and if so, state what he had done or was doing in that direction, and give in full the prospects of the business at the time you left it, and also at the date of Morgan's death, if you know. Answer this as freely as you can.

244 A. Q. 9. Was pro'pering until last year I with him, (Ja'y 4, 1868.) I don't know anything about it since that time. Morgan's business, as I stated, was dull the last year I was with him (1867); he had a large district, and I heard him talk about extending his business, but do not know whether he ever did so or not.

Q. 10. State what Mr. Morgan had done towards advertising the flour and making it known to the business world & to the trade.

A. Q. 10. Mr. Morgan advertised this flour extensively. Had the exclusive right to, and did advertise in the Memphis street railway cars, and in all the newspapers of Memphis.

Q. 11. About how many barrels did Morgan manufacture on an average per week, say, while you were in his employ?

A. Q. 11. While I was in his employment for the first two years he manufactured a great many barrels of self-rising flour, but can't
245 tell how many. He had five hands employed in the mill and one teamster.

Q. 12. State anything else you know which will be of advantage to the plaintiffs.

A. Q. 12. I have stated all I know about this case of advantage to the plaintiffs or the defendant.

Cross-interrogatories by defendants' counsel, to be answered by each witness.

1. Qu. Are you a white or a black man; which are you? Can you read and write?

Answers to cross-questions by defendant.

Q. 1. A. I am a white man; I am 29; yes, I can both read and write

2. Qu. If, in answer to 3d qu., you say you were in the employ of said Allen F. Morgin, give the exact date when you quit his employment. If you cannot state it exactly, give it as nearly as you can, and state where Morgan was carrying on the self-rising flour business at the time you quit him; give the street and number, or state what street was near the
246 place.

A. Q. 2. I will not be positive, but I think it was January 4th, 1868. Yes, he was at 448, Main street, Waldran Block.

Q. 3. If in answer to 5th question you say the self-rising flour business was profitable while Morgan was engaged in it, please state accurately by what means you know it was profitable. Do you know of your own knowledge how much the flour cost per barrel, unprepared? If you state the amount. Do you know of your own knowledge what ingredients were used in preparing, or manufacturing it? If yea, state all their names. Do you know of your own knowledge what each of the ingredients used cost, at Memphis; and, if yea, state the exact amount; if you do not know of your own knowledge how much these things cost, state who told you and how you got your information; state fully. If you state what the
247 net profit was, please state fully how you figure it out, giving each item of the expense necessary in its preparation.

A. Q. 3. I judge so, from the amount of business he carried on, for he done a whaling big business for the first two years. Yes; the first year the unprepared flour cost, 1st grade, 14.00$; 2 grade, $12.00; 2d year I think 1st grade cost 12 or 12.50 dollars, and 2d grade about $10.00; sometimes it went up a little. Yes, I know the ingredients we used in manufacturing the flour, but do not think I should state the articles used as he (Morgan) confided them to me, and had a patent on the same. I have already stated that I don't know what all of them cost. I can give the name of each article, if so directed by the court trying this cause.

Q. 4. If you answer that the profit was greater when flour was prepared for the trade, as interrogated in question 6, please state, if you know of your own knowledge the cost of the bags, and the actual cost per
248 package of labour to put the flour in bags; state fully by what means you arrive at the cost of making flour when Morgan prepared it for himself and when he prepared it for the trade. Did you ever see Morgan's invoices, and is it from them that you estimate the cost, or are you just guessing at it, or did you get it from hearsay?

A. 4. Q. I have answered this question as fully as I can in question 6, above. I don't know the cost of the bags, nor the actual cost for packing. Yes; I saw of his invoices. I then knew he was making considerable profit, but it has been so long that I can't now particularize.

5. Qu. Do you know of your own knowledge whether the flour was actually sold as fast as manufactured, or do you know from Morgan's books, or hearsay? How do you know but that it was placed out to be sold on commission?

249 A. 5. Q. Yes; for the first two years we could hardly manufacture it fast enough; the last we were not so crowded, but sold all we made, but were not rushed. He kept all of his books as long as I was with him. I left, so did my father, of our own accord. He paid father $100 per mo., and me $50 per month. All the flour which left the mill was sold, none sent out on commission. In the city it was sold on 30

days, and in country it was shipped c. o. d., unless paid for before it left the mill. I was familiar with his business. Had it been otherwise I would have known it.

Q. 6. If in answer to 9th question you say that Morgan's business was growing and increasing, state how you know it, whether from Morgan's books, or from hearsay. Is it not a fact that Morgan's business had been a losing one from the start; that he had become hopelessly insolvent; that his debts had accumulated until he owed the enormous sum of
250 twenty thousand dollars, and did he not then go into bankruptcy, and did he not, at the time he took the benefit of the bankrupt law, owe the agents of the Rumford Chemical Works, or that company, nearly three thousand dollars for ingredients he had purchased of them to prepare this self-rising flour. If Morgan had paid this debt in cash instead of by going into bankruptcy, how much would his profits on the self-rising flour business have amounted to? State how many barrels of flour Morgan manufactured while you were with him; state the number as nearly as you can, and then state how much he made on a barrel; state how much the entire profit amounted to, and then state how it happened that he had to pay $3,000 worth of the articles he used in its manufacture by going into bankruptcy. Do you know of your own knowledge that he ever
251 made anything out of the business; if yea, how much?

A. 6. Q. I did not state that his business was increasing, but I do not think he was much in debt. I frequently purchased the drafts (400 & 500 dollars at a time) to pay the Rumford Works for the ingredients. He did not go into bankruptcy while I was with him, but I think he did afterwards, and then went into business with Oliver, Finnie & Co. I can't state how many barrels Morgan sold. I don't think M. could if he were living. Can't you find his books? I did not know he paid $3,000 by going into bankruptcy. I don't know positively that he made any clear money at any time, but he seemed to be prospering and doing a driving business, and paid off his hands regularly and promptly.

7. X-qu. If in answer to 10th question you state what Morgan had done, &c., please state how he advertised, in what papers, and by what
252 other channels, and state fully how you know these facts.

A. 7'-qu. He advertised in the Memphis Avalanche, Memphis Appeal, Evening Ledger, and the Memphis Post, while it lived, and in the Memphis street cars, and by posters of every kind, large and small, and sent them to all parts of the country, and on all of his letter-heads, bill-heads, and envelopes; I know these things because I saw them, and every barrel of flour had a brand in the head of it, and packages branded.

8. X-qu. Did you keep any record of the number of barrels of flour Morgan manufactured; and if yea, where is that record now? File it if you have one, or file a copy. If you kept no copy, how do you arrive at the number? State fully. Is it guess work or hearsay?

A. 8th qu. Why, do you suppose I could keep a list of all flour sold by Mr. Morgan? I did business for him in the ordinary way. Morgan kept regular books.

253 9. X-qu. Did not Morgan devote his whole time to the business in superintending it and soliciting?

A. Q. 9. Yes, he was a very attentive man to his business, and devoted all his time to this business of manufacturing rising flour.

10. X-qu. Did Mr. Morgan keep a wagon or wagons for delivering his flour?

If yea, how many, and how many horses or mules did the business constantly require? How many did he have and use about this business?

A. Q. 10. He had one horse and two mules required about the business; one large double spring 2-horse wagon, and one one-horse spring wagon, all engaged at the business of hauling at the self-rising mill.

X Q. 11. How many men did Mr. Morgan have in his employ in and about the self-rising flour business while you were with him? Give their names, and state the particular department in which each worked.

A. Q. 11. Had six; R. M. Stanley (now dead), weighed out the
254 ingredients; P. M. Stanley did general work about the mill, whatever was needed; Wash Williams (I think was his name, a colored man), turned one of the mills; Enoch Holliday, colored man, also turned one of the mills; John Morgan, brother of Allen F. Morgan, done general business, such as receiving, shipping, backing, paying of bills, collecting, &c., &c.; a man by the name of Reuben (all I recollect of his name, he was a negro), drove the team awhile, then he quit, and J. W. McCallum awhile; drove the team for two years; I think he now lives in Mo.

12. X-qu. How much rent did Mr. Morgan pay for the house in which he manufactured this flour, when you were with him? Have you, in stating the profits of the business included the item of rent?

A. 12'-qu. For the first house, 306 Front street, Mosely Block, I don't know what he paid for it; but for his second house I think he paid $75 per mo.

13. X-qu. How much money did Morgan spend per year in advertising?

A. 13'-q. I don't know, but it was a considerable.

255 14 X-q. How much did Morgan pay you for your services?

A. 14'-q. $50.00 per month.

PHIL. M. STANLEY.

LITTLE ROCK, ARKANSAS, *Sept. 14th*, 1876.

The foregoing deposition of P. M. Stanly was taken before me and reduced to writing by me, and I certify that I am not interested in the cause, nor of kin or counsel to either of the parties, and that I sealed them up and put them in the post-office without being out of my possession, or altered after they were taken.

Given under my hand the 14th day of September, A. D. 1876.

E. B. THOMPSON, *J. P.*

256 *Testimony, R. A. Litle.*

Plaintiffs introduced R. A. LITLE, who testified as follows:

I am a grocer, of the firm of Litle & Shields. Knew Allen F. Morgan in his life-time. His self-rising flour was well advertised, and had a good reputation. We bought the flour of him, and have continued to buy of Oliver, F. & Co. We have quit keeping it in store, and *and* supply it only on orders. We commenced business in 1866, and very soon commenced buying of Morgan. The Taylor Manufacturing Co., of St. Louis, sold self-rising flour here. We got some of them twice.

W. W. COLEMAN testified:

I knew A. F. Morgan. Knew he was making self-rising flour until his death. It had been advertised well, and was popular. I was in business in 1864, 1865, & 1866, and sold a great deal of it. I used it until his death, and heard it highly spoken of. Rents have decreased from 1870 until now. Think they commenced to decline more rapidly in 1873.

257 Plaintiffs read the answer of defendants and exhibits, as follows:

Ans. of def'd'ts to bill of discovery.

First circuit court of Shelby County.

STATE OF TENNESSEE,
County of Shelby:

KATE G. MORGAN, ADM'X,
vs.
OLIVER, FINNIE & CO.

The answer of the defendants, I. P. Finnie, J. N. Oliver, and G. M. Weston, partners, under the name of Oliver, Finnie & Co., to the bill of discovery of the said plaintiff filed in the foregoing cause:

These defendants admit the pendency of the suit as charged. They also admit the making of the contract with said Morgan in substance as stated, but for the full particulars of which they refer to the contract itself, to be produced on the trial of the cause. They admit that said Morgan died on the 19th of April, 1869. They admit that self-rising flour from wheat and buckwheat was prepared and manufactured by defendants and said Morgan under said contract, from the date thereof until the death
258 of said Morgan, on the 19th day of April, 1869, the aggregate of amount of flour prepared between said dates having been 381 barrels of wheat flour and 20 barrels of buckwheat flour, for all of which they state that the said Morgan was fully paid by them in his life-time, at the rate of $1.25 per barrel, and overpaid to the amount of $119.11, which balance the said Morgan owed these defendants at the time of his death, after deducting all he was entitled to receive for preparing flour under said contract. Defendants utterly deny that any self-rising flour, whether of wheat or buckwheat, was manufactured or prepared by them under or by virtue of the said contract, or under the license or privilege granted by the Rumford Chemical Works to said Morgan, after the said 19th day of April, 1869, when said Morgan died. Defendants admit that said Morgan had such a license or privilege from the said chemical works to use their patent process for preparing self-rising flour, which license
259 bore date February 1, 1869, though not granted or issued to said Morgan until after the 15th of that month, and that said license would have continued for the space of five years had said Morgan lived so long, and had the same not been sooner revoked. But defendants shew that the said license or privilege was merely a personal license or privilege to said Morgan individually, in the nature of an agency, granted without any consideration whatever, and revocable at the pleasure of the said

grantors; and that the same necessarily, by its nature, terminated on the death of said Morgan. This was well understood by said Morgan, for he had held a previous license of the same form and character from the same parties, dated January 1, 1866, and running for five years, to January 1, 1871, covering all the period of the contract with these defendants. In May, 1868, the said Morgan filed his petition for a discharge as a
260 bankrupt, and under the idea that said license conferred a right of property in the use of said patent, he inserted the same in the schedule of his assets and property in bankruptcy, but he subsequently amended his schedule by showing that said license was not assignable or transferable; that it had other conditions annexed, was claimed by the grantors to be forfeited, and that they would not recognize the right of any purchaser, and he accepted another license, dated February 1, 1869, covering nearly two years of the same time, and thus recognized the former license as annulled and the surrender of it in bankruptcy as void. Defendants knew of these facts when they entered into their contract with said Morgan, and when his sudden and unexpected death occurred they at once applied to the agents of the said chemical works to know whether said license would pass to his widow or personal representatives intending to make a new arrangement, if possible, to carry on the busi-
261 ness in which they had made considerable investments and had incurred heavy expenses without any adequate return, and for which they could not otherwise receive any remuneration. Being informed in reply that the right reverted to the grantors by the death of Morgan, and that no right would be recognized in his heirs, executors, administrators, or assigns, and the said grantors at the same time expressing a wish to continue the business in the hands of these defendants, and offering to grant them a new license, they were compelled to accept, and did accept, a license in their own favor similar to that which had been previously issued to said Morgan, and the same was accordingly issued to them on the 1st day of May, 1869. Defendants had then purchased and on hand a large quantity of flour and materials for preparing the
262 same, had incurred heavy expenses in preparing the place for its manufacture, in advertising, and other charges, and they could not stop the business without incurring most serious losses, and destroying the patronage and good-will just beginning to be built up. They could not go on without having the right to use the patented process, and they could only obtain that by accepting the license offered to them. And these defendants further shew that the said contract between them and the said Morgan was dissolved, determined, and extinguished by the death of said Morgan, and ceased thereby to be binding on either party, as to any matters subsequent to the time of such death. And these defendants state and shew that all the self-rising flour prepared or manufactured by them after the death of said Morgan, on the 19th of April, 1869, was prepared and manufactured by and for themselves in their own right, under and by virtue of a license or privilege granted to them, dated May 1, 1869,
263 by workmen and laborers employed and paid by themselves, and not under or by virtue of the said contract with said Morgan, or of the licenses granted to him as aforesaid; and they deny the right of the said plaintiff, as adm'x as aforesaid, to any recovery or discovery touching flour so prepared after the said 19th of April, 1869; and not waiv-

ing their said objection, but insisting thereon, and protesting that they are not bound by law to make such discovery, and that the same cannot be used in any manner to their prejudice, they say that between the said 19th day of April, 1869, and the 1st day of April, 1870, they prepared and manufactured by and for themselves in their own right and at their own costs and charges, under and by virtue of the right granted to them by the said license, dated May 1, 1869, to use Horsford's cream tartar substitute in preparing self-
raising flour, twelve hundred and thirteen (1,213) barrels of self-
264 raising flour, of which 754 barrels were from wheat flour, and 53 barrels from buckwheat flour, and 406 barrels of wheat and buckwheat; but they cannot tell the number of each kind, none of which was prepared or manufactured under the said contract between these defendants and said Morgan, or under or by virtue of the license or privilege granted to said Morgan, by any of the licenses granted to him by said Rumford Chemical Works. And defendants file herewith as part of this answer, a statement shewing as nearly as they can, the number of barrels of each kind prepared in each month, from the 15th of February, 1869, to the 1st of April, 1870, and make the same Exhibits A & B herewith. They are not able to tell the number of barrels for each of the months of Jan., Feb., and March, 1870, nor the kinds of flour, and are only able to give the aggregate of all kinds for those months.

And having fully answered they prayed to be dismissed, &c.

ELLETT & PHELAN, *Att'ys.*

J. P. Finnie & G. M. Weston, two of the above defendants be-
265 ing sworn, say the facts stated in the foregoing answer are true to the best of their knowledge, information, and belief.

G. M. WESTON.
J. P. FINNIE.

Sworn and subscribed before me Dec. 1st, 1871.

A. A. MOORE, *J. P.*

Self-rising flour prepared by Oliver, Finnie & Co. from Feb'y 15, 1869, *to* 19' *April*, 1869.

	Wheat flour.	Buckwheat.
Number of barrels in Feb'y	32	4
" " " " Mar	269	13
" " " " Ap'l	80	3
	381	20

381
20

401 bbls.

Exhibit A.

Self-rising flour prepared by Oliver, Finnie & Co. from April 19th, 1869 to April 1st, 1870.

In May, 1869, bbls. wheat flour		55	
" June, " " " "		163	
" July, " " " "		94	
" Aug., " " " "		57	
" Sept., " " " "		65	
" Oct., " " " "		115	
" Nov., " " " "		112	
" " " " buckwheat			24
266 In Dec'r, 1869, bbls. buckwheat			29
" " " " wheat		93	
		754	53

754
53

807

In Jan'y, Feb., & Mar., 1870... 406 all kinds.

1,213 bbls.

Exhibit B.

(Endorsed:) 1431. First circuit court. Kate G. Morgan, adm'x, vs. Oliver, Finnie & Co. Answer to petition for discovery, &c. Filed Dec. 2, 1871. Frank Talft, clerk, by L. E. Boswell, d. c. Ellett & Phelan.

The following agreement of counsel was read—agreement as to pleadings:

Agreement as to pleadings.

U. S. cir. court, dist. of W. Tennessee.

J. N. PAYNE AND WIFE, ADM'RS OF A. F. Morgan,
v.
OLIVER, FINNIE AND CO.

267 The plaintiffs having this day filed a demurrer to certain pleas filed by the defendants on 28th of May, 1878, to the amended declaration; it is now agreed between the counsel that the plaintiffs, without waiving the matters of said demurrers, will take issue on said pleas, and that on the trial of the cause the plaintiffs may have the benefit of the points specified in said demurrers by way of instruction to the jury, so far as the court may be of opinion that the said grounds of demurrer are well taken. December 7, 1878.

H. F. DIX & ESTES & ELLETT,
For Defendants.
HARRIS, McKISSICK & TURLEY,
For Plaintiffs.

271 Many of them giving it up owed John Dwight & Co. amounts varying from $2,500 to $8,000 respectively. The amount which Allen F. Morgan owed said firm at the time of his death was about $2,500. The aggregate loss of said firm from such failures amounts to more than $30,000. I know this from the records, correspondence, and dealings of the firm of John Dwight & Co.

6. Qu. State whether the business of manufacturing self-raising flour by the use of said article, has during the last seven years been profitable or unprofitable as a business.

Ans. to 6th interrogatory. There are six individuals prosecuting the business with moderate success, and four, that are doing little or nothing in it. I believe that not one of the six above-mentioned is making more than a bare living out of it.

7. Qu. State what the chief requisites for a successful prosecution of said business are; state fully.

Ans. to 7th interrogatory. I would say unhesitatingly large
272 capital, extensive advertising, great energy, patience, and persisteney.

PIERCE & DIX,
Def'ts' Att'ys.

Exceptions & cross-interrogatories, same as to deposition of Alfred S. Tallmadge.

HARRIS, McKISSICK & TURLEY.

The plaintiff's except to the 3d, and any answer that may be made thereto; 1st, because it seeks to bring out evidence which is irrelevant to the issues joined in this case. 2d, because it is incompetent to prove that the business of manufacturing self-rising flour from cereals by the use of Horsford's patent, &c., was unprofitable when carried on in some other place, in order to show that it was unprofitable when carried on in Memphis, and the surrounding country. The plaintiff's except to the 4th question, because it calls for an opinion simply on a matter which can be determined as a matter of fact. The plaintiffs except to the 5th, 6, 7, & 8th, questions, because in determining the value of the parties in question to plaint-
273 iffs' intestate in the way he was using it at his death, it is not competent to show whether said patent was valuable to other persons at different places, because the business which certain other persons were doing at different places under the patent may not have been profitable, is no legal evidence to establish the worthlessness of said patent to plaintiffs' intestate.

Reserving these exceptions, plaintiffs cross-examine.

1. X-qu. What business are you engaged in, and how long have you been engaged in your present business?

Ans. to 1st X-interrogatory. I am a manufacturer of bicarbonate of soda, and have been engaged in the busines for more than thirty years.

2. X-qu. Are you in any way connected with the Rumford Chemical Works, or John Dwight & Co.; if you are, state what your connection is?

Ans. to 2d X-interrogatory. I am a member of the firm of John Dwight & Co., who are agents of the Rumford Chemical Works,
274 for the sale of their acid for the use of self-rising flour manufac-

turers only, and for the issuing of licenses within limited territory, a' stated in answer to 2d interrogatory.

3. X-qu. State to how many persons the right to use the Horsford's patent was granted from 1865 to 18 ?

Ans. to 3d X-interrogatory. About 30 persons and firms to date.

JOHN DWIGHT.

Taken, subscribed, & sworn to before me, at the city of New York, this 16th day of June, 1877.

EDGAR KETCHUM, JR.,
Notary Public, New York City and County.

STATE OF NEW YORK,
City and County of New York, ss:

I, Henry A. Gumbleton, clerk of the city and county of New York, and also clerk of the supreme court for the said city & county, being a court of record, do hereby certify that Edgar Ketchum, jr., before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and
275 sworn and authorized to administer oaths to be used in any courts in said State, and for general purposes; and that his signature thereto is genuine as I verily believe. In testimony whereof I have hereunto set my hand, and affixed the seal of the said court and county the 16th day of June, 1877.

[L. S.] HENRY A. GUMBLETON, *Clerk.*

276 *Depo. of Maurice.*

1. Qu. What is your name, age, and occupation; and where do you reside?

Ans. 1st interrogatory. My name is John R. Maurice; residence, Newtown, Long Island; age, 64; and occupation, manufacturer of bicarbonate of soda.

2. Qu. For what territory have John Dwight & Co. *have* been the agents of the Rumford Chemical Works in the sale of the right to use Horsford's patent pulverulent phosphoric acid for the purpose of manufacturing self-rising flour?

Ans. to 2nd interrogatory. The territory for which John Dwight & Co. have been the agents of the Rumford Chemical Works in the issuing of licenses granting the exclusive right to manufacture, use, and sell the Horsford's patent pulverulent phosphoric acid for the purpose of making self-rising flour, embraced originally all the United States, except New England, the city of New York, and its vicinity, and the States of New Jersey, Oregon, and California; no consideration has been received for the
277 issuing of such licenses, except such prospective profits as it was hoped would be derived from the sale of the acid.

3. Qu. State as nearly as you can (without being to the trouble of ascertaining exactly the number, if convenient) the number of licenses, like those issued to Allen F. Morgan in his life-time, and to Oliver, Finnie & Co., all of Memphis, that were issued to parties within that territory to carry on the self-rising flour business.

Answer to 3d interrogatory. About thirty.

4. Qu. State whether said parties had any channel other than the home of John Dwight & Co. through which they could procure said article known as Horsford's patent pulverulent phosphoric acid, and state whether they got it through your house?

Answer to 4th interrogatory. No other channel without violating their agreement. John Dwight & Co. within their territory were sole agents for
278 the sale of the acids for the purpose of manufacturing self-rising flour. All parties that were licensed did buy the acid of John Dwight & Co., and I know of no other channel through which they could have obtained it.

5. Qu. State whether said parties in a majority of cases made the business of manufacturing self-rising flour by use of said article profitable; state fully and how you know.

Ans. to 5th interrogatory. In two-thirds of the cases the parties referred to gave up the business because they could not make it a success. Many of them giving it up owed John Dwight & Co. amounts varying from $2,500 to $8,000 respectively. The amount which Allen F. Morgan owed said firm at the time of his death was about $2,500. The aggregate loss of said firm from such failures amounts to more than $30,000. I know this from the records; correspondence and dealings of the firm of John Dwight & Co.

6. Qu. State whether the business of manufacturing self-rising
279 flour by the use of said article has during the last seven years been profitable or unprofitable as a business.

Ans. to 6th interrogatory. There are six individuals and firms prosecuting the business with moderate success, and four that are doing little or nothing in it. I believe that not one of the six above mentioned is making more than a bare living out of it.

7. Qu. State what the chief requisites for a successful prosecution of said business are; state fully.

Ans. to 7th interrogatory. I would say unhesitatingly, large capital, extensive advertising, great energy, patience and persistency.

PIERCE & DIX,
Def'ts' Att'ys.

Exceptions & cross-interrogatories same as to deposition of Alfred S. Tallmadge.

HARRIS, McKISSICK & TWRLEY.

The plaintiffs except to the 3d, and any answer that may be made thereto; 1st. Because it seeks to bring out evidence which is irrelevant
280 to the issues joined in this case. 2d. Because it is incompetent to prove that the business of manufacturing self-rising flour from cereals by the use of Horsford's patent, &c., was unprofitable when carried on in some other place in order to show that it was unprofitable when carried on in Memphis and the surrounding country. The plaintiff's except to the 4th question, because it calls for an opinion simply on a matter which can be determined as a matter of fact. The plaintiffs except to the 5, 6, 7, & 8th questions, because in determining the value of the patent in question to plaintiff's intestate in the way he was using it at

his death, it is not competent to show whether said patent was valuable to other persons at different places. Because the business which certain other persons were doing at different places under the patent may not have been profitable is no legal evidence to establish the worthlessness of said patent to plaintiff's intestate.

Reserving these exceptions plaintiffs cross-examine:

281 1. X-qu. What business are you engaged in, and how long have you been engaged in your present business?

Ans. to 1st cross-interrogatory. I am a manufacturer of bicarbonate of soda, and have been engaged in the business for more than thirty years.

2. X-qu. Are you in any way connected with the Rumford Chemical Works or John Dwight & Co.? If you are, state what your connection is.

Ans. to 2nd cross-interrogatory. I am a member of the firm of John Dwight & Co., who are agents of the Rumford Chemical Works for the sale of their acid for the use of self-rising flour manufacturers only, and for the issuing of licenses within limited territory, as stated in answer to 2d interrogatory.

3. X-qu. State to how many persons the right to use the Horsford's patent was granted from 1865 to 18——

Ans. to 3d X-interrogatory. About 30 persons and firms to date.

JOHN R. MAURICE.

282 Taken, subscribed, and sworn to before me, at the city of New York, this 16th day of June, 1877.

[L. S.] EDGAR KETCHUM, JR.,
Notary Public, New York City & County.

283 *Depo. J. C. Grant.*

Circuit court of the United States, western district of Tennessee.

PAYNE AND WIFE
vs.
OLIVER, FINNIE & CO.

MEMPHIS, *Jan'y 24th*, 1879.

It being necessary for Joseph C. Grant, a witness for the def'ts, to leave Memphis to-night, and he having given his deposition, taken by consent, which has been reduced to writing in short hand by James Walsh, and there not being time to have the same written out in long hand before the departure of the witness, it is agreed that Mr. Walsh may write out in long hand his short-hand notes and sign the same as correct, and the same then may be read as the deposition of said witness, subject to all ex-
284 ceptions as to relevancy and competency, all formal matters being waived.

PIERCE & DIX, *For Def't.*
HARRIS, McK. & TURLEY,
GANTT & PATTERSON,
For Pl'ffs.

Circuit court of the United States, western district of Tennessee.

PAYNE & WIFE
vs.
OLIVER, FINNIE & CO.

This deposition of JOSEPH C. GRANT was taken by consent of the parties in presence of counsel on both sides, at Memphis, on the 24th day of January, 1879.

Int. 1. Please state your name, age, & occupation.

Ans. Joseph C. Grant; age, 34 years; occupation, manufacturer.

Int. 2. Please state whether you have ever been in the busi-
285 ness of manufacturing self-rising flour; and, if so, state when and where, and how long you were in the business.

Ans. I have, and in the city of Chicago, Ill., in 1871, for a term of about one year. I have been engaged in the manufacture of bread preparations going on twelve years. The manufacture of self-raising flour is but one branch of my line.

Int. 3. Please state what acids you use in the manufacture of your self-raising flour.

Ans. Cream of tartar or tartaric acid.

Int. 4. Please state what you know, if anything, of the article known as Hosford's cream of tartar substitute, or Hosford's pulverulent phosphoric acid.

Ans. I have been familiar with the article a number of years, but have never used it on account of its keeping—what we term its keep-
286 ing qualities. It is an acid in a clear state alone—that is, an acid by itself, combined with nothing else, or when combined with bicarbonate of soda or any alkali it loses its strength in a very short time, so much so that it is not used by any manufac'urers as a bread preparation outside of the Rumford Chemical Works. The acid itself can be bought in the open market by any manufacturer at a less cost than cream of tartar, but on account of its keeping qualities has been rejected by all manufacturers. The self-raising flour that is manufactured with cream of tartar or tartaric acid or citric acid is considered by all—that is, those who have had experience in the business—to be superior in every shape.

Int. 5. State if these last-named acids lose their strength.

287 Ans. They do not unless subjected to a very severe moist atmosphere. If a package of self-raising flour prepared by the Rumford acids be placed alongside of a package prepared with cream of tartar acid when the Rumford goods would be perfectly worthless, containing no strength, and would be rejected by any woman using it for common house purposes, three months after that the cream of tartar would be perfectly good—that is, the package prepared with the cream of tartar, it would be perfectly good and sound. I have been familiar with this acid used by the Rumford Chemical Works, as it has been on the market when I could have obtained it and used it, but have every time preferred the cream of tartar or tartaric acid or citric acid in preference to it.

Int. 6. Did you work in competition with those using this acid
288 in Chicago?

Ans. Yes, sir. The company that were using the Rumford

acid had been on the market for several years and had built up a very fair trade. I should say they have been ten years or more in the business, and I don't think the firm is worth five thousand dollars more at the end of the ten years than they were when they started. You may know they had not a great deal of money when I, with only five thousand dollars cash on hand, went on the market with a new brand of goods and weakened them so that they would have given up in two weeks—would have stopped in two week'—had I held out. My goods were preferred to their brand by the oldest firms and firms of the best trade they had in Chicago, for
289 quality alone—that is, the quality of my goods replaced that company's goods.

Int. 7. How many houses were carrying on the business of self-raising flour in Chicago at the time you speak of?

Ans. There had been, up to the time I started, twenty-two houses—twenty-three with them. They were the pioneers in the business. The business had looked as though there was a large amount of money in it, and people with a small amount of capital had started in the business and gone to work and worked up a considerable trade. Each time one of these houses went down, it increased the sales of the other houses. When I started with this amount of capital I mentioned and my knowledge of the business, &c., I advertised very extensively that my goods were being manufactured from cream of tartar or bicarbonate of soda, or pre-
290 pared with baking powder.

Int. 8. How much per barrel/ does flour, after it is prepared and made self-raising, sell above the flour that is not prepared?

Ans. Well, it ranged from one dollar to three dollars in Chicago. The sales were very large. The way we figured in going into the business and the profits we would make was this: Here is three dollars a barrel/ profit. Now, if we can sell ten, fifteen, or twenty barrels a day, we could make a fair profit; but, as experience has taught that in starting a business, we have the expenses of the house, factory rent, interest on capital, insurance, travelling men's expenses, bookkepers' expenses, mill and factory hands' expenses, living of the partners, paper-box material, and all that which is necessary to run a business in ship shape. Then counts up your
291 heavy advertising. We had a good trade from the start, employed first-class salesmen, and we put up our goods in an attractive shape. We were lenient to our customers, giving every inducement to first-class houses that stood well and were worthy of credit, as we supposed, and had a good trade; but the day we shut down, we had lost, and we were not quite a year in the business, over $1,600.00. The balance of the five thousand was paid for machinery in the start, and went to bad accounts, &c. In the city of Chicago, men who were well acquainted with the other concerns told me that at the time we shut down, they never saw a business put up so on its feet in a quicker or more systematic way than this was put up, or built up a trade so quick. It may be as well to give you
292 a little detail as to how we were induced to start into the business.

I had been in the business of bread preparations a long time, and understanding all about it, I saw the disadvantages which all manufacturers were laboring under at that time, that is, as my idea went; for instance, to the grocery man and sold him our bread preparations; the miller went to the grocery man and sold him his flour.

So when a woman desired to make a buiscuit she went to the grocery man and bought a can of yeast powder. The retail price of this was fifty or sixty cents a pound; different stores sold at different prices. I figured it out and found that to raise a barrel of flour with this powder cost her about nine dollars, while the actual cost of the flour was seven dollars. The raising properties cost nine dollars. Knowing it
293 was not more than one in a hundred thousand knew that thing, I immediately went into the self-raising flour business, seeing a profit of three or four dollars a barrel when flour was down, and it was down at the time I went in, but the profits went down as low as one dollar, and before I got through I sold it at 50c. advance. But, to figure the thing on paper, at that time there looked as though there were about twenty to thirty thousand a year in the business. There were immense quantities of baking powders used, and by this means we could kill two birds with one stone; we could sell flour and baking powder and make a profit on both. But after that twelve months' experience I went back to old first principles.

Int. 9. How many of the twenty-three firms or houses failed?

Ans. Twenty-three; 100c. on the dollar; and the twenty-fourth,
294 or the house that, if I am rightly informed, is out of existence.

Int. 10. What difficulties do you meet with in introducing self-raising flour?

Ans. Well, like all other goods you put on the market, a new brand of goods, and it may have the greatest virtue in the world, but unless you make it known by advertising and such methods it will not be a success. Now, self-rising flour was an article at that time unknown to households; it was a new idea, a new arrangement of putting the old articles on the market in a new color, so a good deal of advertising had to be done.

Int. 11. Did many purchase self-rising flour who had previously purchased in the shape of baking powder and flour?

Ans. Yes, in the large cities particularly; there is a great deal of it bought to-day amongst the mechanics and working classes.
295 They have to have a very early breakfast, and while the mechanic is eating his breakfast they can *can* have his dinner ready to take with him by the time he has done.

Int. 12. How long have you been acquainted with the Memphis market as a market for self-raising flour?

Ans. I have been acquainted for about four years here.

Int. 13. Have you represented any company?

Ans. I represented the Taylor Manufacturing Company of St. Louis up to last year. They were manufacturers of self-raising flour, blueing, and extracts.

Int. 14. Did this company have an agent in Memphis?

Ans. I was their agent here part of the time; I represented the house.

Int. 15. What did they use to prepare their self-raising flour?

296 Ans. Cream of tartar or tartaric acid for the acids, and bicarbonate of soda for the alkali.

Int. 16. Through what house was it sold here?

Ans. I sold it all over to the retail trade. We put it through no agency, or through no particular house. For instance, I sold it to Patterson &

Rose; Duffy & Carey; Lytle & Shields; McLaughlin, C. R. Ryan, and others.

Int. 17. Any others that you remember?

Ans. Yes; there are quite a number of others; but I want my books to aid me to think of their names. Those are all I remember now. The last time I sold self-rising flour on this market, I sold thirty barrels—running from twenty-five to thirty barrels, if I remember right; but I desisted from selling it here, because there was no margin or profit in
297 it either for the company or me. I made a contract with the company for a certain share of all the profits; 33⅓ cts. per barrel was my share, and I had to talk ten or fifteen minutes for that, to make a sale. I looked upon it as a bagatelle, not worth my time and trouble, and I stopped selling it.

Int. 18. Do you regard yourself as an expert in the business of self-raising flour?

Ans. Well, I do not from any knowledge I have gained from books; but from my practical experience, there is no acid or alkali known to manufacturers or chemists in the United States to-day that I do not consider myself as well posted about as any man. I have been manufacturing bicarbonate of soda, salaratus, sal-soda in the Charles River Chemical Works, of Boston.

Int. 19. From your knowledge of the business, is it a profitable or a losing business?

298 Ans. Well, I can say this in reply to that: That if ten thousand dollars were offered me to-night, barring my present business, and that I was not hard up, or anything of that kind, where a man would take anything almost; if a man, I say, was to offer me ten thousand dollars to put in the business, and allow me to manage it as I saw fit, and he would give me three-fourths of the profit, I would not take it. I have had applications since I have been in Memphis this time, from a reliable, first-class house, inquiring as regards the margin there was in it. They thought there was a large profit in it. They figured me out $4.00 per barrel profit; but when I showed them where they were making a mistake, they dropped the subject.

Int. 20. Please state what you mean by $4.00 profit.

299 Ans. Their way of figuring the profits, they would figure a barrel of flour cost so much, the acid or preparation to raise that so much, the paper box so much, and then they could get so much for it. That is what they termed the profit.

Int. 21. What is essential to make a business a success, or make it approach success?

Ans. A heavy capital and good management and plenty of advertising. To make the self-raising floor business a success it would be necessary to spend all your profits in advertising for two years, and you must have enough w'en you get the business upon the bridge, as it is termed, to get it over on the other side; or, in other words, you must have money enough to carry on the business after it is established.

Int. 2. Does it require any particular effort to keep it?

Ans. Yes, sir.

300 Int. 23. State what it requires.

Ans. If you have a business that you are running, we will say of this class of trade, and you are turning out twenty barrels a day and, you

have up to this time been advertising very extensively. Now, if you will withdraw your advertisements for six or twelve months your trade will drop right down to almost nothing. For this reason this is a class of business, or class of goods, that can be kept up only by push and constant advertising.

I will explain why. A lady goes to a grocery and she gets a package of this self-raising flour. It is not as good as what she got before, and she does not know what is the matter with it. The natural moisture of the flour will, after a given time, even if the goods are kept in a quite dry place, destroy the raising property. But the groceryman who has a number of the packages on hand, in order to get his own money out of
301 them—he does not want to throw them away, or take them for his own use—will force them upon the trade, regardless of the reputation of the manufacturer. That of course, will kill that customer, as she does not want any more of such self-raising flour. But the goods being constantly advertised, some neighbor has purchased a sack that is all right, she hears about it, and seeing the goods constantly advertised, is induced to try them again, and upon the next trial she will probably find the self-raising flour as good as she found it in the first place.

Had the advertising not been kept up, and the business pushed as it were, she never would have tried any more. In starting a business of this kind, being anything unknown, it is necessary to advertise very extensively and let the people know what they are manufacturing, and what properties they are using in the manufacture, and also show the people for economy's sake the difference in the cost of self-raising flour and
302 baking powder and bread preparations separate.

Int. 24. State if Hosford's cream of tartar substitute made by the Rumford Chemical Works is sold generally in the markets of the United States.

Ans. It can be bought in every city in the United States.

Int. 25. State what shape it is put up in.

Ans. You can buy it in five-pound tins or wood—ten, fifteen, or twenty-five pounds, or in such packages as is desired. It is also put up in another form that any person can manufacture if they so chose; put up in paper packages; one end contains bicarbonate of soda, and the other end contains a sufficient amount of the acid to neutralize or act upon this. When the whole package is mixed with twenty-five pounds of
303 flour, it produces this self-raising flour. One package is sufficient for twenty-five pounds of flour, and the whole is equal to twenty-six pounds of self-raising flour.

Int. 26. Will the bicarbonate of soda and acid put up separately in the package lose its strength?

Ans. It won't lose it as quick. Well, it is necessary to keep it dry. With age it deteriorates, not exactly in efferves'ence, but it becomes, it becomes—let me see what they call it—well, you may say it loses its strength after a given time. But when combined with alkali it must be immediately hermetrically sealed. In proof of that you cannot find a package of this Rumford Chemical Works goods on the market under the name or brand of bread preparation, yeast, or baking powder, but what is put up either in glass with wax over the top hermetrically sealed, or tin
304 with wax around the edges, and also hermetrically sealed, which is

an endorsement of that company itself that the goods will not stand the weather, the climate.

Int. 27. How soon will it show injury or lose its strength when mixed with flour?

Ans. Flour is considered amongst manufacturers in my line of goods to be the best coater. What we call coater is covering or protector on account of its being a heavy glutinous substance. Flour goes through what is called two sweats, one in the grain and one after it has been milled or ground. If this preparation is placed in flour that has not been through the second sweat, she is liable to spoil in 24 or 48 hours, in accordance with the condition of the flour. If the flour is well seasoned and properly milled, it can be kept from six months up. But it is the
305 aim of the manufacturers using this acid to put very small amounts in store, so that it will be used up very quick. Where persons are having little or no trade for it they put up only a very small amount, and only leave such quantities to their customers as will just fill their demand until the next time, say a week or ten days, so as to keep his goods fresh and good.

Int. 28. What was done during the years efforts were first made to introduce this Hosford's acid to give it notoriety or establish it in the market?

Ans. Well, they first got Leibeg's testimony, who was then considered one of our best chemists in this and the old world, one of the highest authorities. Hosford was a good chemist himself, and discovered this article, and big fish strike big fish. He got the endorsement of Leibeg, and it
306 was an easy matter to get everything under him, to get every one else follow him. Whereever Leibeg's signature went, or whenever the smaller chemists, or the smaller lights as you may term them, saw Leibeg's signature they readily endorsed what he had done; all the chemists and physicians, in fact, throughout the United States and Europe.

Int. 29. Of what is this acid made?

Ans. It is made from bone. The heavy endorsement of this acid will naturally lead persons who are unsophisticated, or who have no knowledge of this business, or who are in no ways interested in it, and don't care to know anything about it, its endorsement by Leibeg would, I say, give them to understand or lead them to think that it is one of the most perfect things ever discovered.

For instance, to put it plainly, we will take up a nice clean bone,
307 taken from a healthy animal, and extract from that bone acid phosphate or phosphoric acid, as some term it; you will find it in fish; it goes to build up the brain, muscles, &c., that which the body requires.

Now, after all these testimonials are got from chemists and physicians throughout the country there at once springs up an immense demand, and now it is necessary to go to the bone-yards of the prairies, slaughter-houses, &c., and take everything in the shape of bone, regardless of where it came from, what condition it was in, or anything about it. When the manufacturing company has a demand for one hundred thousand pounds of acid phosphate all of a sudden, they neither smell, taste, nor examine the bones that come in. Knowing these to be facts, I preferred the cream of tartar.

Int. 30. Of what is cream of tartar made, and how?

308 Ans. Cream of tartar is taken from wine. In the vineyards of France, in their wine districts, where the wine is pressed or taken from the grapes, the wine is put into casks; after a certain time fermentation takes place, and after fermentation takes place an alkali is formed, and as the alkali is formed it throws down a peculia' acid or deposits a peculia' acid, which gathers on the sides of the cask in a crystal form. This, when the wine is drawn off, is taken from the cask and sent to Bourdeux, the same as wheat is sent in this country to Chicago, St. Louis, or New York, as the general centre for that material. The argols—that is this peculiar acid—are taken from the wine casks and sent to market, that is, to Bourdeux, which is the headquarters for argols; and from
309 there they are sent all over the world for different purposes, for manufacturing bread preparations, for dyeing, coloring, medicinal purposes, and other different purposes. There are different grades of argols, as in wheat. The lower grades are what is called the wine lees; these are taken for manufacturing or refining. The highest grade is that which gathers on the top; that is culled or selected as the choicest, or cream of tartar. That which lies between that and the cask contains the sediment, or impurities of the wine, which comes from the skins of the grape, seeds, and the impurities that may gather in the wine in the pressing of the grapes; that is sent on to market and is taken by the chemical works and refined.

310 Cross-examination:

X-int. 1. What is a pound of this Hosford's pulverulent phosphoric acid, put up in these packages, one end of which contains acid and the other bicarbonate of soda, worth? What has it been worth, or what is it worth on an average?

Ans. I think it runs from fifteen to sixteen cents a package, each package containing a sufficient amount to make 25 pounds of self-rising flour.

X-int. 2. How has that price varied since you have known it?

Ans. I don't think there has been much deviation in the price. I have not handled the goods, and therefore have not been any ways interested in regard to the commercial price, wholesale or retail. I don't think there has been but slight variation, if any, in it. It is a class of goods that
311 gets a certain hold on the market and remains there. I say this because of a simple instance. In a certain town, South, I think they sold about the same quantity as they did four years ago, neither gained nor lost. To the best of my knowledge and best observation, going over the market, it would be about the same.

X-int. 3. What merchant here in Memphis wanted you, on this trip of yours, to go into the business of self-raising flour?

Ans. No man wanted to go into the business. He gave me the figures as to the profits to be made and asked me about it.

X-int. 4. What merchant was that?

Ans. I decline to tell.

X-int. 5. We want the question answered.

WITNESS (to def'ts' counsel:) Shall I answer it?

Mr. DIX, (def'ts' counsel:) You may, if you see fit so to do. I will leave it to your own discresion.

Ans. (WITNESS:) Tom Clark, of M. Gavin & Co. The only
312 reason why I declined to answer was this: I am dealing with the

parties in my line of business, and knowing I was detained in Memphis as a witness in this case the question came up whether there was not a large profit in the business. The way they figured it, the cost of the flour, the cost of sacks, the cost of all the material used, looked as though there were three or four dollars profit per barrel in it.

X-int. 6. What kind of goods are you selling now?

Ans. I am selling yeast powder, or baking powder, one and the same thing.

X-int. 7. Has it any competition with the Rumford Chemical Works' goods?

Ans. None whatever. In fact the Rumford Chemical Works' yeast powder, or baking powder, which they have in the market in the hermetrically sealed cans, has no competition with other baking powders.

313 The fact of its being put up in hermetrically sealed cans and the time it keeps, we do not consider it in competition. Of course such a house as Oliver, Finnie & Co., with their large influence and capital combined, will create a certain demand for the Rumford Chemical Works' baking powder. But unless they keep up heavy advertising, and throw out every inducement that can be thought of, they will go down as they have done in this market.

X-int. 8. You say, then, that you have got a better thing in the way of powder which you propose to sell to the trade, and do sell to the trade, than the Rumford Chemical Works have. Have you not at all places taken pains to explain that your powder is better than the Rumford Chemical Works' powder?

Ans. No, sir.

314 X-int. 8½. Is it not part of your business?

Ans. No, sir; and for this reason: That I never run down another man's house nor his goods to introduce myself or my goods. I work upon this basis: I have goods that I can guarantee; that I sell for less money. These are my inducements for merchants taking my goods in preference to ones they are now using. The route I travel is the southeast, and I don't come in competition, or see so few of the goods on the market that I don't consider it competition, as I lose no sales or reduce no prices on account of it. The only competition I ever met with, if competition you may call it, was in the city of Memphis; that is, they were handled in larger lots here than any other point south; that is, the Rumford Chemical Works.

X-int. 9. By whom were they handled?

315 Ans. By Oliver, Finnie & Co., G. A. Eckerly, and one or two other wholesale houses had them in stock. Whether they were purchased or on consignment, I don't know. I don't think there were many of them sold from any house except from the house of Oliver, Finnie & Co. The reason of their abandoning the trade I don't know, but I have my own ideas, and that is that the goods would not keep.

(Counsel for plaintiff states that the witness volunteered an answer uncalled for; that in response to a question he ventured to surmise a conjecture in place of a fact, and answer was objected to on these grounds.)

X-int. 10. Give the date when you first commenced selling the goods of the Taylor Manufacturing Company in Memphis.

Ans. About the first of '76.

X-int. 11. When did you quit?

Ans. I quit last March—that is, from taking orders. I have a brand still running on the market now; just the same.

316 X-int. 12. What are you doing now?

Ans. I am manufacturing for myself in Philadelphia.

X-int. 13. What are you manufacturing?

Ans. Baking powder.

X-int. 14. When did you begin manufacturing in Phila.?

Ans. In May, last.

X-int. 15. When you first commenced selling the Taylor Manufacturing goods in this market, what baking powder was principally in vogue in this market?

Ans. Dooley, of New York, John S. Dunham, of St. Louis, Taylor Manufacturing Company; understand they had a large trade before I came on; Rumford was on the market; Steele & Price, of Chicago, and there were from three to five other brands that had a small trade.

X-int. 16. Is the business in which you are engaged in Phila. a large or a small one; and have you a partner in it?

Ans. I have no partner; I have agents who handle my manu-

317 factured goods. You cannot term it a large business; still we are doing a very fine business.

X-int. 17. How much capital have you got in your business?

Ans. I have got any amount of it, for the simple reason that I manufacture on this principal: My agents buy all the raw materials, and to avoid partnership and all the troubles that come in partnership, I have these parties to handle my goods at a certain price on the manufacture.

X-int. 18. What are the properties in your baking powder that raises flour?

Ans. Cream of tartar, anhidrus or burnt alum, starch, and bicarbonate of soda.

X-int. 19. In what does your profit consist in this manufacturing business of yours?

WITNESS. What do you mean?

X-int. 20. (Counsel.) I want to know how you make your profit out of the business?

Ans. My agents and myself divide the profits equally.

318 X-int. 21. What is the gross profit on a barrel of self-raising flour?

(Objected to by def'ts' counsel, for the reason that it is not shown that the witness manufactured self-raising flour by the barrel or in any other shape.)

X-int. 22. Are you making self-raising flour?

Ans. I am not.

X-int. 23. What are you making?

Ans. Baking powder exclusively.

X-int. 24. In what sort of packages do you put up your powder?

Ans. In one-eighth pound cans, one-quarter pound cans, one-half pound cans, one-pound cans; also lots in bags, barrels, and kegs.

X-int. 25. What is your gross profit on a pound of it?

(Def'ts' counsel objected to question as irrelevant.)

Ans. As I said before, I cannot tell what my gross profits are until my

expenses are added to them; until I see what is to be added to the manufacturing.

X-int. 26. What are the raw goods that your agents furnish you?

319 Ans. Cream of tartar, anhidrus or burnt alum, starch, soda, tin cans, labels, wooden boxes, and so on.

X-int. 27. How many pounds of your baking powder do you make on an average during a month?

Ans. It is according to how many customers we have, and how many men there are selling it.

X-int. 28. What is the average per month?

Ans. I have not been in the business long enough, at least in this branch of business, to average them.

X-int. 29. How long have you been in business?

Ans. Since last May, on this branch.

X-int. 30. Can't you strike an average?

Ans. I can strike an average of this business from May to the present time—about seven thousand dollars; but there are but very few goods sold through the hot season of the year, as people do not use yeast or baking powder, but buy their bread at the baker's, so as to avoid

320 building a fire in their stoves in the evening.

X-int. 31. What is the price per pound of your baking powder?

Ans. $2.32 per dozen pounds, delivered.

X-int. 32. What does it cost you to make and deliver a dozen pounds of it?

Ans. That I cannot get at.

X-int. 33. What does it cost to make, without delivering, a dozen pounds of it?

Ans. About $1.65.

X-int. 34. You have spoken of this branch of business; do you mean you have got another business besides this of manufacturing baking powder?

Ans. I have not.

X-int. 35. You mentioned in a former answer something about seven thousand dollars. What do you refer to by that?

Ans. That was the gross sales, from May up to the present time, as near as I can estimate them.

X-int. 36. How many agents have you got?

Ans. My agents have one travelling man, and I travel part of the time. They also have the local agents.

321 X-int. 37. What do you mean by "my agents have one travelling man?"

Ans. The parties who handle my manufactured goods—who have exclusive control of my manufactory.

X-int. 38. Don't you travel part of the country yourself for them?

Ans. I travel for myself.

X-int. 39. Don't they get one-half of the profits?

Ans. Certainly; but out of my own half I pay my own expenses. If I sold ten thousand dollars' worth of goods, and I should make so much profit, half of that would go to them.

X-int. 40. How does it happen that you travel in the southeast?

Ans. Because I have a very large acquaintance.

X-int. 41. Who travels in the southwest?

Ans. This other man of theirs.

Does he get any part of the profits?

Ans. He sells on commission for the house, and carries other goods.

322 X-int. 42. What part of his business come to you then?

Ans. All the yeast powder that he sells, one-half of the profits come to me.

X-int. 43. Is it just one house that has the management and control of your goods?

Ans. One house.

X-int. 44. What house is it?

Ans. David Carrick & Co.

X-int. 45. How extensive is the factory and building in which you make your powder?

Ans. Say, about the size of this room, 60 by 25.

X-int. 46. Do you own the building, or rent it?

Ans. I rent it.

X-int. 47. Who pays the rent?

Ans. I pay the rent.

X-int. 48. Does it come out of your part of the profit?

Ans. It comes out of the profit of the goods, and that is got by reckoning in.

X-int. 49. Does the burden of the rent fall on you exclusively?

323 Ans. No, sir.

X-int. 50. Are not you and David Carrick partners?

Ans. No, sir.

X-int. 51. Does David Carrick & Co. own the building?

Ans. Yes, sir.

X-int. 52. What is their business besides selling your goods?

Ans. Manufacturers of crackers, candy, and confectionary.

Re-examination:

Int. 1. What do you mean when you say you do not know what your profits are until your expenses are added to them?

Ans. I mean that I cannot tell what my gross profits are until I add all the expenses to the first cost of the goods; I then deduct from that the amount that I received for them.

Int. 2. Is David Carrick & Co.'s house a large or a small one?

Ans. It is a very large house.

324 Int. 3. State whether it is the first house in Philadelphia of its kind.

Ans. To the best of my knowledge and belief it ranks the first house in Philadelphia; established in 1841.

Correct transcript.

(Signed) JAMES WALSH.

325 *Depo. of Maurice.*

STATE OF TENNESSEE,
County of Shelby:

First circuit court.

KATE G. MORGAN, ADM'X OF ALLEN F. MORGAN, dec'd,
vs.
OLIVER FINNIE & CO.

Interrogatories to John Dwight and John R. Maurice, of the firm of John Dwight & Co., of the city of New York, witnesses on the part of the defendants in the foregoing cause.

STATE OF TENNESSEE,
County of Shelby:

First circuit court.

KATE G. MORGAN, ADM'R' OF ALLEN F. MORGAN, dec'd,
vs.
OLIVER, FINNIE & CO.

Deposition of John R. Maurice, of the firm of John Dwight & Co., of the city of New York, on his oath, in answer to certain interrogato-
326 ries in the above action, signed by the attorneys for the plaintiff and defendant, and enclosed herewith.

Int. first. Are you connected with the sale of the right to use Hosford's patent cream of tartar substitute for the manufacture of self-rising flour? If so, state in what capacity, and how long you have been so employed, and at what place, and state for whom and on whose behalf you were so employed.

JOHN R. MAURICE, of full age, being duly sworn according to law, on his oath deposes as follows:

To the first interrogatory he says: John Dwight & Co. are agents for the sale of Hosford's patent cream of tartar substitute to manufacturers of self-rising flour; appointed by the Rumford Chemical Works in the month of July, 1862; the appointment was verbal, not written. They
327 have ever since acted as agents, and have granted licenses at their discresion in the name and on behalf of the Rumford Chemical Works, signed by the treasurer thereof. The rights are not sold, but given to those the agents think most likely to conduct the business to the best advantage. Their place of business has been, during the whole time, No. 11 (eleven) Old Slip, in the city of New York.

Int. second. Was any license for the use of said preparation ever issued to Allen F. Morgan, the plaintiffs' intestate? If yea, state whether more than one such license was issued to said Morgan, and give the dates of each; and especially whether one or more of such licenses was dated and issued prior to the 1st of May, 1868?

Int. third. If you state that a license or other authority was granted or issued to said Allen F. Morgan before the 1st day of May, 1868,
328 please annex to this answer a copy of such document, and also a copy of any agreement cotemporaneous therewith, signed by said Morgan, if any such agreement existed.

To the second and third interrogatories he says:

Three licenses or authorities in all were issued to Allen F. Morgan. The orignal agreements to the same on his part are herewith returned, the first dated ninth of September, 1865, marked Exhibit A; the second, which changes the location of territory appropriated to him, dated the first day of January, 1866, marked Exhibit B, and the third, dated the first day of February, 1869, marked Exhibit C.

Int. fourth. Have you had any correspondence with the plaintiff, Mrs. Kate G. Morgan, on the subject of said right or patent in May, 1869, or at any other time? If yea, please annex the letters of Mrs. Mor-
329 gan, or copies of them, and copies of your answers thereto, as exhibit with this deposition.

To the fourth interrogatory he says:

A letter herewith returned, marked Exhibit D addressed to Mr. John Dwight, was received from Mrs. Kate G. Morgan, dated Memphis, May 3d, 1869, which was replied to by John Dwight & Co., under date of May 8th, 1869, a copy of which reply, marked Exhibit E, is herewith returned.

Int. fifth. If you state that a license or authority or other document was granted or issued to said Allen F. Morgan before the 1st day of May, 1868, please state whether a similar license or authority was subsequently granted to him, and at what time. And state particularly *now* and why it came to pass that said second license was issued to him. What reasons
330 did he give for asking such second license? If he applied for it by letter, please annex his letter to your answer to this question.

To the fifth interrogatory he says: I stated in answer to second and third interrogatories, authority was granted to Allen F. Morgan, dated first of February, 1869, but not actually issued until on or about the fifteenth of that month, (Exhibit C.) This last authority was issued at his particular request as conveyed by his letters, dated 27th Jan'y and 9th Febr'y, 1869, herewith returned, and marked, respectively, Exhibit F, and Exhibit G.

Our reason for granting his request was that the former authority had become null and void by his insolvency and relinquishment of business, and we wished to give him a chance to use the experience he had gained in recuperating the business, and at the same time his occupation might furnish support for himself and family. Copies of our answers to
331 these two letters are herewith returned, marked, respectively Exhibit H and Exhibit I.

Int. sixth. Was said Allen F. Morgan indebted to you on or about the 1st of May, 1868? If yea, in what amount, and for what account or consideration?

ELLETT & PHELAN,
Attys' for Def't.
W. G. RAINEY AND
WM. H. STEPHENS,
Att'y for Pl'ff Mrs. Morgan.

To the sixth interrogatory he says: Allen F. Morgan was indebted to John Dwight & Co. up to the 23d Jan'y, 1868, in the sum of two thousand four hundred and forty-seven $\frac{33}{100}$ dollars for supplies of Horsford's cream of tartar substitute and supercarbonate of soda furnished him at various times from Jan'y, 1867, to Jan'y, 1868, and the said amount remains due and unpaid to the present time.

332 We agree that the deposition of John Dwight and John R. Maurice, his partner in the firm of John Dwight & Co. may be taken in New York on the foregoing interrogatories and the X-interrogatories annexed below, before any officer entitled to administer an oath without commission, waiving all objections to competency and relevancy.

W. H. STEPHENS AND
W. G. RAINEY,
Att'ys for Pl't'ff.

Cross-interrogatories in behalf of pl'ff Kate G. Morgan.

Int. 1st. If, in answer to defendants' second interrogatory, you say that more than license was issued to A. F. Morgan to use Horsford's patent cream of tarter substitute, state whether one was issued after May 1st, 1868, and file with your answer a copy of the same, and the agreement of
333 same date referred to in it.

To the first cross-interrogatory he says:

The agreement mentioned in this interrogatory is referred to in the answer to the second and third direct interrogatories and returned therewith, marked Exhibit C.

The form of license is given herewith, marked Exhibit M.

Int. 2d. State whether you rec'd any letters from the def'ts, Oliver, Finnie & Co., or either of them, in relation to Allen F. Morgan, or to the *the* subject of the contract between Oliver, Finnie & Co. and A. F. Morgan, or in relation to any contract then existing, or proposed between Oliver, Finnie & Co. and the Rumford Chemical W'ks; if you did, please file each & all of said letters with this deposition, and file copies of your answers to the same.

334 To the second cross-interrogatory he says:

A letter from Oliver, Finnie & Co. is herewith returned, marked Exhibit K, and dated April 20th, 1869; a copy of our reply to the same, dated April 24th, 1869, is herewith returned, marked Exhibit L. We never retain copies of the telegrams we send away, and this is the only letter on the subject that we have received from Oliver, Finnie & Co., to the best of our knowledge and belief.

Int. 3d. What is the number, date, and name of the patent issued to E. N. Horsford, of Cambridge, Mass., which was transferred by him to the Rumford Chemical Works, and under which Hosford's patent cream tartar substitute is prepared? Please annex a copy of the patent and also copy of contract entered into or assignment made to the Rum-
335 ford Chemical Works by said Hosford under which said works claim to use the privilege of manufacturing Hosford's cream tartar substitute.

Int. 4th. State whether it is under and by virtue of this patent to Hosford and said assignment to the Rumford Chemical Works, that said

works made the several contracts with A. F. Morgan you have above referred to; and if said several contracts with A. F. Morgan were made under different patents, give the name, number, and date of the patent under which each contract was made, and annex copy of the patent under which the last contract with Morgan was made, unless it is called for by some other interrogatory.

To the third and fourth cross-interrogatories he says: We have never had copies of the patents issued to Prof. Hosford nor of his as-
336 signments thereof in our possession, and therefore cannot answer the inquiries made by the third and fourth cross-interrogatories.

(Signed) JOHN R. MAURICE.

STATE OF NEW YORK,
City & County of New York:

I hereby certify that on the 23d day of November, 1871, in my office in the city of New York, appeared personally John R. Maurice, and was then and there duly sworn, and heard the enclosed interrogatories, and made answer to them respectively; and that the foregoing answers, together with the Exhibits A, B, C, D, E, F, G, H, I, K, L, and M, herewith also enclosed, are the true answers made by him to such interrogatories and cross-interrogatories respectively, and that he subscribed his name thereto.

Witness my hand and official seal.

GEORGE W. COLLES,
Commissioner for Tennessee in New York.

337 *Fowler patent, May* 1, 1849.

(65.)

DEPARTMENT OF THE INTERIOR.

United States Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted John Fowler, dated May 1st, 1849, antedated March 13, 1845, # 6418 for improvement in the preparation of flour for bread making.

In testimony whereof I, Ellis Spear, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twentieth day of December, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and second.

[L. S.] (Signed) ELLIS SPEAR,
Commissioner.

338 No. 6418.

United States of America to all to whom these letters patent shall come:

Whereas Henry Jones, of Bristol, Great Britain, has alleged that he has invented a new and useful improvement in the preparation of flour for bread

making, he having assigned his whole right, title, and interest in said improvement to John Fowler, of New York,) in the State of New York, which he states has not been known or used before his application, has made oath that he is a subject of the Queen of Great Britain, that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury
339 of the United States the sum of five hundred dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose:

These are *the*, therefore to grant, according to law, to the said John Fowler, his heirs, administrators, or assigns, for the term of fourteen years from the thirteenth day of March, one thousand eight hundred and forty-five, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Henry Jones in the schedule hereunto annexed, and is made part of these presents.

In testimony whereof I have caused these letters to be made
340 patent and the seal of the Patent Office has been hereunto affixed.

Given under my hand at the city of Washington this first day of May, in the year of our Lord one thousand eight hundred and forty-nine, and of the Independence of the United States of America the seventy-third.

D. C. GODDARD,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

[L. S.] EDMUND BURKE,
Commissioner of Patents.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, Henry Jones, of Broadmead, in the city and county of Bristol, in the Kingdom of Great Britain, baker, have in-
341 vented a "new preparation of flour," for certain purposes hereafter mentioned, and I do hereby declare that the following is a full and exact description:

The nature of my invention consists in the adding to a certain weight of flour such quantities of alkalines and acids, sugar and salt as shall, by the addition of water only, enable such prepared flour to be manufactured into bread, &c., without the use of fermenting matter. To enable others skilled in the art to make and use my invention, I will proceed to describe the method of preparing the flour: I take the wheat or other grain from which the flour to be prepared is made of fine quality, perfectly dry, or make it so by passing it over a kiln; after grinding and dressing it,
342 I add to one hundred weight of it ten and a half ounces (avoirdupois) of tartaric acid, finest quality, and as *as* dry as possible, and which has passed through a sieve of sixty wires to the inch. I mix it well with the flour, and pass both through a flour-dressing machine, and allow it to remain untouched for two or three days, that the water of crhystaliza-

tion, always more or less present in tartaric acid, may be absorbed by the flour, and so form around the particles of acid a coating of flour that will prevent its immediate contact with the particles of alkali, and thereby I avoid reducing its power of action; afterwards I mix with the quantity of flour and acid before named, twelve ounce of bicarbonate of soda (or fourteen ounces of bicarbonate potassa) in powder, twenty ounces of
343 muriate of soda, and eight ounces of loaf-sugar in fine powder, and mix the whole th'roughly together, and then put the whole mixture through a flour-dressing machine, when it will be ready for use. The quantities of acids and alkalies may have to be slightly varied according to their quality; but the point to be attained is the neutralization of both. My prepared flour when used to make bread, biscuits, or other the like food only requires to be made into dough with cold water in the proportion of ten ounces of water to one pound flour for bread, and about six ounce' to one pound of flour for biscuits, and baked at once in a well-heated oven. I do not claim mixing acid and alkali with flour as a substitute for yeast, nor do I claim mixing one of these ingredients with flour in the dry state when the other is dissolved for making bread; but what
344 I do claim is mixing both the acid and alkali with the flour in the dry state, sugar and salt being added or not at will, substantially in the manner and for the purpose herein set forth, as a new article of manufacture.

Dated in Bristol aforesaid this first day of August, one thousand eight hundred and forty-eigth.

HENRY JONES.

Witnesses:
RICH. BRADFORD.
JAMES LEADER.

Ex., J. W. W.

345 *Testimony of Buckham.*

J. F. BUCKHAM testified:

I have been in the grocery business since 1862. In 1865, '6, '7, and '8 I was partner of defendant Finnie—Finnie & Buckham; quit January 1, 1869; Allen F. Morgan was connected with Finnie & B. a short time. He commenced about the 1st or 10th of September, 1868, and continued until January 1, 1869. Morgan had been in no business for some time previous to Sept., 1868. He broke and went into bankruptcy some time before then. Finnie & Buckham carried on business at 284 Main street, which Oliver, Finnie & Co. occupied when that firm was formed. There were two mills and a pair of scales when the machinery was brought there. Cirode, the assignee in bankruptcy, had possession or charge of it. This machinery remained in possession of Oliver, F. & Co. after I left. The business waswell advertised. Morgan put in no capital. We did not, I
346 think, make more than 350 bbls. while he was with us. I can't tell whether the business was profitable. We prepared it only as we needed it; kept 5 or 6 barrels on hand; did not keep the mills running; I have used it in my family very little; thought it a humbug; it will not make good light bread; any other preparation known is better.

Defendants introduced Morgan's petition and schedules in bankruptcy.

347 SCHEDULE A, 2.

IN THE MATTER OF)
A. F. MORGAN, BANKRUPT.)

Creditors holding securities.

Reference to ledger or voucher.	Name of creditor.	Residence and occupation.	When and where contracted.	Value of securities.	
				Dollars.	C'ts.
	W. B. Waldran...	Memphis, capitalist.	Memphis, 1866....	2,750	00

Amount of debts.		Particulars.
Dollars.	C'ts.	
4,480	00	On the 16th April, 1868, petitioner executed to W. B. Waldran a deed of trust on his horses, mules, wagons, business, fixtures, household goods, &c., to secure the payment of a note for $4,480, given for borrowed money. Deed is registered in Shelby County, Tennessee. A. F. MORGAN.

SCHEDULE A, 3.

IN THE MATTER OF A. F. MORGAN, BANKRUPT.

Creditors whose claims are unsecured.

Reference to ledger or voucher.	Names of creditors.	Residences & occupations.	Amount.	Where and when contracted.	Nature and consideration of the debt.
			Dollars Cts.		
	W. B. Waldran	Memphis, capitalist	744 55	Memphis, 1866,-'7,-'8	Note for house rent.
	Harris, Cochran & Co	" merchants	1, 782 84	" " "	" " m'd'se.
	R. S. Taylor & Co	" "	1, 222 00	" " "	" " "
	Kimball Bros	" "	180 47	" "	Judg. for m'd'se & account.
	J. J. Levin	" "	24 00	"	Note " "
	D. R. Hadden & Co	" "	339 90	"	a/c " "
	Taylor, Gay & Rutland	" "	18 50	"	" " "
	Harris & Hunt	" "	135 98	"	" " "
	Sam. Tate	" capitalist	600 00	" '67	Note " loaned money.
	Memphis & Charleston R. R.	" carrier	300 00	" '62	" " " "
	P. H. Thompson	Louisville, Ky, preacher	25 00	" '68	a/c " rent.
	John Dwight & Co	New York, merchants	2, 447 33	New York, '67 & '8	" " m'd'se.
	Memphis Gas-Light Co	Memphis, corporation	3 00	Memphis, 1868	Gas bill.
	R. C. Hite	" printer	15 00	" '67-'8	Bal. for coal.
	Memphis City R. R. Co	" corporation	320 00	" " "	Note & ac't for advertising.

ALLEN F. MORGN.

347 SCHEDULE A, 2.

IN THE MATTER OF }
A. F. MORGAN, BANKRUPT. }

Creditors holding securities.

Reference to ledger or voucher.	Name of creditor.	Residence and occupation.	When and where contracted.	Value of securities.	
				Dollars.	C'ts.
	W. B. Waldran...	Memphis, capitalist.	Memphis, 1866....	2,750	00

Amount of debts.		Particulars.
Dollars.	C'ts.	
4,480	00	On the 16th April, 1868, petitioner executed to W. B. Waldran a deed of trust on his horses, mules, wagons, business, fixtures, household goods, &c., to secure the payment of a note for $4,480, given for borrowed money. Deed is registered in Shelby County, Tennessee. A. F. MORGAN.

SCHEDULE A, 3.

IN THE MATTER OF A. F. MORGAN, BANKRUPT.

Creditors whose claims are unsecured.

Reference to ledger or voucher.	Names of creditors.	Residences & occupations.	Amount.	Where and when contracted.	Nature and consideration of the debt.
			Dollars Cts.		
	W. B. Waldran	Memphis, capitalist	744 55	Memphis, 1866,-'7,-'8	Note for house rent.
	Harris, Cochran & Co	" merchants	1, 782 84	" " "	" " m'd'se.
	R. S. Taylor & Co	" "	1, 222 00	" " "	" " "
	Kimball Bros	" "	180 47	" " "	Judg. for m'd'se & account.
	J. J. Levin	" "	24 00	" "	Note " "
	D. R. Hadden & Co	" "	339 90	" "	⅔ " "
	Taylor, Gay & Rutland	" "	18 50	" "	" " "
	Harris & Hunt	" "	135 98	" "	" " "
	Sam. Tate	" capitalist	600 00	" '67	Note " loaned money.
	Memphis & Charleston R. R	" carrier	300 00	" '62	" " " "
	P. H. Thompson	Louisville, Ky, preacher	25 00	" '68	⅔ " rent.
	John Dwight & Co	New York, merchants	2, 447 33	New York, '67 & '8	" " m'd'se.
	Memphis Gas-Light Co	Memphis, corporation	3 00	Memphis, 1868	Gas bill.
	R. C. Hite	" printer	15 00	" '67-'8	Bal. for coal.
	Memphis City R. R. Co	" corporation	320 00	" " "	Note & ac't for advertising.

ALLEN F. MORGN.

349 SCHEDULE B, 2.

IN THE MATTER OF }
ALLEN F. MORGAN, BANKRUPT. }

PERSONAL PROPERTY.

B.

H. Eadleman, Humbolt, Tenn., order on treas. Mem. & Ohio R. R'd	29 50
W. A. Nelson, at Miss. & Tenn. depot	36 44
Balance on note of J. H. McMahon to W. B. Waldran, and transferred by delivery to me	62 90

A. F. MORGAN.

SCHEDULE B, 2.—*Inventory.*

D.

Household goods and furniture, household stores, wearing apparel, and ornaments of the person	
Provisions on hand, about	10 00
Wearing apparel of self, wife, and two children, about	175 00
Jewelry of self and wife, about	9 00
1 laundry stove & two tubs	15 00
1 large lot of gilt and rosewood frames with glass & brackets	400 00
1 desk	15 00
1 wash-stand	4 00
1 clock	4 00
1 wheelbarrow	3 00

A. F. MORGAN.

350 SCHEDULE B, 2.—*Inventory.*

G.

Carriages and other vehicles.

1 two-horse platform spring wagon and harness, (in Waldran's trust)	500 00
1 one-horse wagon	125 00

351 SCHEDULE B, 2.—*Inventory.*

IN THE MATTER OF }
A. F. MORGAN, BANKRUPT. }

L.

Goods or personal property of any other description, with the place where each is situated.

Patent right for preparing self-raising flour together with its accomplished patronage	10,000 00

The above right is held under contract with the Rumford Chemical

Works, of East Providence, Rhode Island, by which contract there is given and granted to petitioner the exclusive right to manufacture and sell self-rising flour by the use of Horsford's cream of tartar substitute. The right to prepare self-rising flour is not of itself patented.

By the terms of the contract aforesaid, said right is not assignable or transferable.

352 And petitioner has been notified by John Dwight, the agent of the Rumford Chemical Works, that they claim said contract is forfeited, and that they will not recognize the right of any purchaser under this proceeding.

A. F. MORGAN.

353 *Adjudication of bankruptcy on debtor's petition.*

In the district court of the United States for the western district of Tennessee.

IN THE MATTER OF ALLEN F. MORGAN, Memphis, Shelby County, Tenn. } In bankruptcy.

By whom a petition for adjudication of bankruptcy was filed on the thirtieth day of May, A. D. 1868, at 7.10 p. m.

At office, in Memphis, Tenn., in said district, on the 9' day of March, A. D. 1869, before T. J. Latham, register in bankruptcy.

WESTERN DISTRICT OF TENNESSEE, *ss:*

I, T. J. Latham, register of said court in bankruptcy for said district, upon good proof before me taken, do find that the said Allen F.

354 Morgan has become a bankrupt, within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867; and I do hereby declare and adjudge him a bankrupt.

Witness, T. J. Latham, register of said court, as aforesaid, at Memphis, Tenn., in said district, on the 9th day of March, A. D. 1869.

T. J. LATHAM, *Register.*

(Endorsed:) Docket case No. 822, page 788. District court of the United States for the western district of Tennessee. In bankruptcy. In the matter of Allen F. Morgan, bankrupt. Adjudication of bankruptcy on debtor's petition.

355 *Notification to assignee of his appointment.*

In the district court of the United States for the western district of Tennessee.

IN THE MATTER OF ALLEN F. MORGAN, BANKRUPT. } In bankruptcy.

At Memphis, Tenn., on the 8th day of April, A. D. 1869.

WESTERN DISTRICT OF TENNESSEE, *ss:*

I do hereby certify to you that you were duly appointed by me as as-

signee of the estate and effects of said Allen F. Morgan, of Memphis, Tennessee, in the county of Shelby, and district aforesaid, bankrupt, at the first meeting of the creditors, on the eighth day of April, A. D. 1869.

And I do also certify that none of the creditors of said bankrupt had proven their claims were present or were duly represented at said
356 meeting; and, further, that you are hereby required, within five days after the receipt hereof, to certify to me at my office, in Memphis, Tennessee, of your acceptance or rejection of said trust.

T. J. LATHAM,
Register in Bankruptcy for said District.

Mr. WM. Y. CIRODE,
Memphis, Tenn.

Acceptance or rejection of assignee.

Dated at Memphis the 8th day of April, A. D. 1869.

To whom it may concern:

Be it known that I hereby signify my acceptance of the trust of assignee of the estate of Allen F. Morgan, of Memphis, in the county of Shelby, and State of Tennessee, bankrupt, notice of my appointment to whic' was, on the 8th day of April, 1869, received by me.

W. Y. CIRODE.

357 CASE No. 822.

In the district court of the United States for the western district of Tennessee.

IN THE MATTER OF ALLEN F. MORGAN, BANKRUPT. } In bankruptcy.

WESTERN DISTRICT OF TENNESSEE, *ss:*

On the 26th day of May, A. D. 1871, before me comes Wm. Y. Cirode, of Memphis, in the county of Shelby, and State of Tennessee, and makes oath and says that he was duly appointed the assignee of the above-named bankrupt, and that as assignee he has conducted the settlement of the estate.

That in obedience to an order of this court, issued December 29th, 1870, he sold at private sale two hand mills and appurtenances for the sum of one hundred and fifty dollars, and one black mare mule for ninety-
358 one dollars. One mule he excepted to Mrs. A. F. Morgan; as she is absent from Memphis, no further exemption has yet been made.

The gray horse is reported dead. The refreshment stand at the Mississippi and Tennessee depot was leased by the company to A. F. Morgan, but said lease was cancelled before his bankruptcy. He demanded of E. Keck the two wagons in possession of said Keck, which he refused to give up, claiming a lien on same for storage; said Keck has the wagons yet in his possession.

Of the money received he has paid C. A. Choate, att'y, $25.00; Haynes & Stockton, att'ys, $25.00; keeping mules, $12.00; expense in getting mules, $4.35.

All of which is respectfully submitted.

W. Y. CIRODE, *Assignee.*

359 *Petition of Cirode vs. Waldran.*

IN THE MATTER OF
ALLEN F. MORGAN, BANKRUPT } In bankruptcy.

To the Hon. Connally F. Trigg, judge of the district court of the United States for the district of West Tennessee:

Your petitioner, W. Y. Cirode, of Memphis, in said district, respectfully shows unto your honor, that he is the assignee of the estate of said bankrupt; that said bankrupt filed his petition & schedules herein on the 30th day of May, 1868. That on the 16th day of April, 1868, said bankrupt executed to W. B. Waldran, of the city of Memphis, in said district, a certain instrument purporting to be a deed of trust, with said Waldran named therein as trustee, with power to sell, as in ordinary trust deeds, and conveying certain personal property therein named, to wit:

Two certain hand mills used in the preparation of Morgan's self-
360 rising flour, then in the cellar of No. 448 Main street, worth about $600.

One pair of black mare mules, with harness for same, and a double spring wagon, then in the city railway stables, worth about $1,000.

One grey horse, worth about $200; then at J. M. White's, in Shelby County, Tenn.

One sewing machine; one piano, and all the household & kitchen furniture, consisting of tables, chairs, stove & utensils, table-ware, bed & bedding, carpets, &c., then in the rooms over said store No. 448 Main street; also a refreshment stand at the Missi'ppi & Tenn. R. R. depot, then rented. A copy of said deed of trust or mortgage will be filed herewith, marked Exhibit A, hereto.

Said conveyance was made to secure a debt due by said bankrupt to W. B. Waldran, the trustee therein, evidenced by note due in March, 1868, for $4,480. W. B. Waldran has proved said debt of $4,480, stat-
361 ing that the same was secured by a policy of insurance on the life of said bankrupt, having departed this life in , 1869, he, the said Waldran, admits a credit of $3,895; and said Waldran has also proved another debt due by note for $744, and states that the same is secured by the deed of trust aforesaid.

Petitioner shows, on information & belief, that the hand mills & appurtenances named in the said deed of trust, are now in the posses'ion of Oliver, Finnie & Co., a firm doing business in city of Memphis, composed of J. N. Oliver & Finnie; that the wagon, together with another wagon belonging to said bankrupt, was left by said bankrupt in January, 1869, at the stables E. Keck & Bro., on Second street, in said city of Memphis, and said E. Keck & Bro. have now advertised the same for sale, to pay charges, or for some other purpose; sale to take place October 20th, 1870.

That so far as petitioner knows no action has been taken by
362 said Waldran under said trust deed, unless it has been to take posses'ion of said property and dispose of it privately, which petitioner charges, on information & belief, he has done as to some of the same. Petitioner believes the household property is in the poss'ion of the widow of said bankrupt, and that the same, together with perhaps some other portions of said property, is exempt from the operation of the bankrupt act. Your petitioner therefore charges that said deed of trust or mortgage

fraudulent & void, that the same was made for the purpose of giving to said W. B. Waldran a fraudulent preferment and priority, to which he had no right by law or in equity, and to prevent an equal distribution of said debtor's effects and property, and that the same was made by said bankrupt in contemplation of bankruptcy and insolvency, and in fraud of the
363 provisions of the bankrupt act, and of the rights other creditors of said bankrupt; that the preferment thereby fraudulently intended ought to be forbid'en by this court, but the same should be declared fraudulent and void, and the said property (save that which is exempt) ought to be declared to be the assets of said bankrupt, and to be taken by petitioner under the orders of the court, and distributed as provided by law.

Wherefore petitioner prays the advisement honorable court in the premises, and that said W. B. Waldran be made party defendant hereto, and summoned to answer the allegations hereof, not under oath, on the 1st day of November term, 1870, of this court. That he be required to answer espec'ally what has become of the property so conveyed to him, or pretended to be conveyed to him, as aforesaid, and as to each and every part thereof, and the circumstances of any transfer made of the
364 same by him.

And that an order be entered enjoining said W. B. Waldran from taking any action under said deed of trust, and from intermeddling with any of said property, or disposing of the same in any manner, and enjoining said E. Keck & Brother from selling said wagon and enj. said Oliver, Finnie & Co. from disposing of or removing said hand mills and appurtenances and other property belonging to the estate of said bankrupt.

And upon final hearing that the said pretended deed of trust be declared fraudulent, and that the said property described in the same be declared to be the property of said bankrupt's estate, and petitioner entitled thereto, and that the several persons now possessing the same be ordered to dellver the same to petitioner to be sold, and the proceeds distributed as
365 provided by law. And petitioner prays for any and all other and further orders and relief as equity and the proper administration of the bankrupt act may and petitioner will ever pray, &c., &c.

CHAS. A. CHOATE,
Sol. for Pet.

W. Y. Cirode beiug duly sworn, on oath says, that the statements made in the foregoing petition as of his own knowledge are true, and those made on information and belief he believes to be true.

W. Y. CIRODE.

Sworn to and subscribed before me this 4th day of Oct., 1870.

ISAAC MORRISON,
U. S. Com.

(Endorsed:) No. 487. In the matter of Allen G. Morgan, bankrupt. In bankruptcy. Petition of W. Y. Cirode, assignee, vs. W. B. Waldran. Filed Oct. 7, 1870. Isaac Morrison d. c. Choate, sol. for pet.

366 U. S. dist. court. In bankruptcy.

IN THE MATTER OF)
ALLEN F. MORGAN, BANKRUPT.)

The answer of W. B. Waldran to the petition filed against him by W. Y. Cirode, assignee, &c., on the 7th day of October, 1870.

This respondent, reserving all usual exceptions, &c., to so much of said petition as he is advised it is necessary or material for him to make answer unto, answering, says: That he admits that said Allen F. Morgan filed his petitions and schedules in bankruptcy on the 30th day of May, 1868, and that petitioner is his assignee.

This respondent further admits that the said Allen F. Morgan, on the 16th day of April, 1868, executed to him a mortgage (and not a deed of trust, as alleged in said petition), upon certain property, at the time belonging to said Morgan, which property, as the respondent believes, is correctly set forth in said petition; and he further admits that
367 said mortgage was made for the purpose of securing this respondent in the sum of $4,480.00, as alleged in said petition.

Respondent further admits that he proved two debts against said bankrupt's estate, the one for $4,480.00, upon which a credit of $3,895.00 should be, and is entered, and the other debt due by note for $744.00, but according to the best of respondent's recollection and belief, petitioner is mistaken in his allegations as to how said debts are respectively represented in said proofs of debt to be secured; the former of said debts being represented, according to respondent's recollection, to be secured by said mortgage (and not by a policy of insurance, as alleged in said petition), and the latter, for $744.00, by a policy of insurance, taken out by this respondent and for his benefit, upon the life of said Allen F. Morgan, and not by said mortgage, as in said petition alleged.

This respondent supposes said proofs of debt to be in possession
368 of petitioner, and here ask' that he produce the same, in order that the purport thereof may the better appear—respondent here taking occasion to state that the proofs of debt should have been made as above set forth as the facts are that way, and, if made otherwise, it was by mistake of his, and not intentional. Respondent, further answering, says that he took out said policy of insurance for his own benefit and at his own expense, as a creditor of said Allen F. Morgan (as did others of his creditors), and that upon the death of said Allen F. Morgan, having collected the same, he applied the proceeds thereof partially in the satisfaction of said note for $744.00, and partially upon said note for $4,480.00, having consulted with the petitioner, and informed him of said application, to the best of respondent's recollection, and that he approved of the same.

Respondent, further answering, denies positively and utterly that
369 said mortgage is fraudulent and void, as alleged in said petition, or that the same was made for the purpose of giving to this respondent any fraudulent preference or pr'ority, or to prevent an equal distribution of said debtor's effects and property, or was made by said bankrupt in contemplation of bankruptcy or insolvency, or in fraud of the provisions of the bankrupt act, or to defraud any of the other creditors of said Allen F.

Morgan; but on the other hand, states the fact to be that said mortgage was in every respect perfectly bona fide; that it was made for a valuable present consideration to secure a debt justly due and owing to this respondent, with no contemplation of bankruptcy and with no intention to defraud any of the other creditors of the mortgage', or in any fraud of any of the provisions of the bankrupt act. Respondent, further answering, says that the said Allen F. Morgan, in his life-time, had the sole right of the secret manufacture and make what is known as "Morgan" self-
370 rising flour "in West Tennissee;" that in order to encourage him in manufacturing said flour, and in introducing his said flour when manufactured into public favor, this respondent furnished him the place used for the manufacture of the same, crediting him for the rent thereof, and advanced him different sums of money in addition, from time to time until his indebtedness to respondent amounted to more than the sums above set forth, which he offered to secure to respondent by said mortgage, which respondent accepted. This respondent, further answering, states that if at the time of the execution of said mortgage the said Allen F. Morgan contemplated bankruptcy this respondent did not know it, and he does not believe that he did, as he recollectes repeatedly to have heard the said Morgan previously and about that time say that he recoiled with utter aversion
371 from the thought of ever being compelled to take the benefit of the bankrupt law, and this respondent regarded his said right to manufacture said flour (taken in connection with the gro'ing popularity of his flour) as sufficiently valuable and remunerative to enable him to pay any debts he might owe, and perhaps at length to be a source of great revenue to him, the said Morgan.

This respondent further answering, denies that he now has, or has at any time had any of said property conveyed in said instrument in his possession, but states the fact to be that he allowed and permitted the said Morgan to have and keep the same notwithstanding said mortgage; and that the said Morgan, as he is informed, during his life-time placed said mills and appertinence' in the possession of Oliver, Finnie & Co., whereas re-
372 spondent suppose' they now are, as alleged in said petition, as to the rest of said property respondent supposes it is, as alleged in said petition in the possession of E. Keck & Bro., and of the widow of said bankrupt (with the exception of one horse which respondent has been informed has died since the execution of said mortgage), and the two mules which the mother of deceased had on her farm and is believed to still retain.

This respondent, further answering, denies that he has ever disposed of any of said property privately or otherwise. This respondent, further answering, says that he perfectly willing, notwithstanding the terms of said mortgage, that so much of said property as may be exempt by law and as may be in the possession of said widow of said bankrupt, may be set apart for her sole use and benefit; and he further agrees that peti-
373 tioner may take immediate possession of the remainder of said property as assignee of said bankrupt and dispose of it at public or private sale as may be most for the advantage of all parties concerned; said petitioner to hold the proceeds of the same to await the decision of your honorable court in this proceeding. Respondent, finally answering, reiterates his former statement that said mortgage was executed in all re-

specets bona fide, that it is good and valid in every particular, and claims his just rights under the same as reserved to and provided for him by the 14th section of the bankrupt law, and having thus fully answered, asks to be hence dismissed with all his reasonable costs, &c.

HAYNES AND STOCKTON,
Sol's for Respondent.

374 W. B. Waldran makes oath that the above answer is true to the best of his knowledge, information, and belief.

W. B. WALDRAN.

Sworn to and subscribed before me this 30th day of Jan., 1871.

ISAAC MORRISON,
U. S. Com.

By consent of parties the above answer, as sworn to by W. B. Waldran shall considered also as his deposition in the cause.

HAYNES & STOCKTON,
For Waldran.

(Endorsed:) No. 487. W. Y. Cirode, assignee, &c., vs. W. B. Waldran. Answer of W. B. Waldran. A. Filed Dec' r21, 1870. A. S. Mitchell, cl'k. Haynes & Stockton for respondent.

375 W. Y. CIRODE, ASSIGNEE OF ALLEN F. Morgan,
vs.
W. B. WALDRAN.

In this matter, the consent of counsel appearing thereto by the answer of W. B. Waldran to and the prayer of the petition of the assignee, it is ordered by the court that the said assignee, W. Y. Cirode, do proceed at once to take possession of the property described in the petition and answer herein (except that portion described as being in the possession of the widow of Allen F. Morgan, the dec'd bankrupt), to wit, the property described as being in the possession of Oliver, Finnie & Co., consisting of 2 hand-mills and all their appurtenances and belongings, used in the manufacture of "Morgan's self-rising flour;" the property de-
376 scribed as being in the possession of E. Keck & Bro., consisting of two spring wagons, and also two black mare mules, and harness for same, and one grey horse, formerly belonging to Allen F. Morgan, now believed to be in the possession of E. Keck & Brother; and also the refreshment stand at the Mississippi & Tennessee Railroad depot, described in the petition.

The assignee may take said property, and parties in possession of the same not claiming title thereto will deliver the same to the assignee. And a certified copy of this order shall be the authority of the assignee for demanding the possession of the said property.

The said property described as being in the possession of Mrs. Allen F. Morgan shall be by the assignee exempted to her sole and separate
377 use, if the same is exempt by law, and all the other property so coming into the possession of the assignee he shall proceed to sell

at public or private sale, in his discretion, and hold the proceeds thereof until the further order of the court.

And all other matters and questions are expressly reserved until the final hearing upon the petition, answer, and proofs herein.

I, A. S. Mitchell, clerk of the U. S. dist. court for the west. dist. of Tenn., certify the foregoing to be a true and perfect copy of the order made this day in said cause.

Witness my hand and official seal this 29th December, 1870.

[L. S.] A. S. MITCHELL, *Clerk.*

(Endorsed:) Copy. W. Y. Cirode, ass., vs. W. B. Waldran. Order of sale. Issued Dec'r 29th, 1870. A. S. Mitchell, clerk.

378 In the dist. court of the U. S. for the west. dist. of Tennessee.

IN THE MATTER OF
ALLEN F. MORGAN, BANKRUPT.

W. Y. CIRODE, ASSIGNEE, &C.,
vs.
W. B. WALDRAN.

This cause coming on to be finally heard upon the pleadings, orders heretofore made therein, and it appearing to the court that there are now in the hands of W. Y. Cirode, assignee as aforesaid, the sum of $174.65, the court is therefore pleased to order, adjudge, and decree that the said W. Y. Cirode, assignee as aforesaid, after paying to Isaac Morrison, esq., the sum of $25.00, as heretofore ordered, and the costs of this proceeding, amounting to $17.30, shall pay whatsoever may remain of said
379 amount in his hands to the said W. B. Waldran or his attorneys, Haynes & Stocton, taking their receipts for the same, upon doing which the said W. Y. Cirode shall be relieved of any further duties as assignee in this proceeding, except that should the said W. B. Waldran desire to bring any suits for the two wagons mentioned in said trust-deed he may prosecute such suit or suits in the name of said W. Y. Cirode, as such assignee, provided he will first indemnify the said W. Y. Cirode, as such assignee, against all costs and expenses which may be incurred thereby.

(Endorsed:) 487. In the matter of Allen F. Morgan, bankrupt. W. Y. Cirode, assignee, &c., vs. W. B. Waldran. Final decree, entered May 27th, 1871. H. E. Andrews, clerk.

380 [Form No. 18.]

Assignment of bankrupt's effects.

In the district court of the United States for the western district of Tennessee.

IN THE MATTER OF
ALLEN F. MORGAN, BANKRUPT. } In bankruptcy.

WESTERN DISTRICT OF TENNESSEE, *ss:*

Know all men by these presents that William Y. Cirode, of the city of

Memphis, in the county of Shelby, and State of Tennessee, in said district, has been duly appointed assignee of said bankrupt in said matter.

Now, therefore, I, Thomas J. Latham, register in bankruptcy of said court, by virtue of the authority vested in me by the 14th section of an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867, do hereby convey and assign to the said William Y. Cirode, assignee, as aforesaid, all the estate, real and personal, of the said Allen F. Morgan, bankrupt, aforesaid, including all the property of whatever kind of which he is possessed or in which he was interested or entitled to have, on the thirtieth day of May, A. D. 1868, with all his deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act.

To have and to hold all the foregoing premises to the said William Y. Cirode and his heirs forever, in trust, nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations, set forth in said act.

In witness whereof I, the said T. J. Latham, register of said court in bankruptcy, have hereunto set my hand, ninth day of April, A. D. 1869.

[L. S.] T. J. LATHAM,
Register of said Court in Bankruptcy.

(Indorsed:) Court No. . In bankruptcy. District court of the United States, district of West Tennessee. Assignment of bankrupt's effects. Petition of . attorney.

381 [Read from book.]

Under notice given, the defendants, without objection, introduced and read from a book, entitled the Hand-Book of Chemistry, by Leopold Gmelin, vol. 3, published in London, England, in 1849, as follows:

a. Three-fourths phosphate (+ Cal.), 3 PO^5, aqueous solution of phosphoric acid is saturated with the salt (*a*), the solution mixed with alcohol, and the white precipitate formed, washed with alcohol and dried, white powder having an acid taste and reddening litimus. With water it separates into the insoluble salt (*b*), and an acid salt, which remains in solution (with one atom of acid). (Berzelin's Ann. Chem. Phys., 2, 167). If the salt (*a*), recently precipitated is immersed in a solution of hydrated phosphoric acid ignited just before it was dissolved in water it gradually changes to a tenaceous acid mass, which may be drawn out into
382 threads, and sticks to the teeth; after drying it becomes yellow, transparent, and very friable. The substance has the same composition as *c*, and is decomposed in the same manner by water, but contains metaphosphoric acid as well as ordinary phosphoric acid. (Berzelin's Lehrb., 4, 277). Graham regards this compound as metaphosphate of lime. If one part of fused hydrated metaphosphoric acid is dissolved in 3 parts of water, the solution saturated hot with the salt *a*, and evaporated, foliated acid crystals are obtained, easily soluble in their own weight of cold water; decomposed by alcohol and by ammonia, which precipitate 50 per cent. of salt *a*; fusing when heated; swelling up with loss of 22 per cent. of water, and changing into a hard, tasteless mass, insoluble in water or cold nitric acid (metaphosphate of lime). Consequently the crystals contain 27 per

cent. of lime, 5 (*d*) of acid and 22 of water (about 4 C_a O, 3 PO^5 + 9 ag.) (Femcke, N. Tr. S., 2, 17.)

383 *d*. MONOPHOSPHATE.—A solution of the salt *a* or *b* in phosphoric, hydrochloric, or nitric acid is evaporated to the crystallizing point. Small crystalline scales, having an acid taste, and becoming moist and viscid in the air; the salt, when ignited, loses water and fuses to a clear glass (of metaphosphate of lime), which is insoluble in water, and when distilled with charcoal gives off a portion of its phosphorous (just two-thirds) in the free state. On this property is founded the ordinary method of preparing phosphorous (II, 104.) (Berzelin's Lehrb., 4, 276.)

e. SUPERPHOSPHATE.—If 1.55¼ parts of salt *a* or of bone ash are digested in water, and more than 98 but less than 147 parts of oil of vitriol, the liquid filtered from the gypsum which is produced contains free phosphoric acid and monophosphate of lime in variable proportions. If

384 this solution is evaporated and the residue heated to low redness it leaves a transparent, colorless, hard, readily fusible, and very acid glass (phosphor glass). This may perhaps be regarded as a mixture of mono-metaphosphate of lime and hydrate of metaphosphoric acid, the latter of which, when strongly ignited, partly volatilizes.

Testimony of Dr. Goodyear.

D. F. GOODYEAR testified: Am a druggist, and have been such for 25 years past; practiced medicine before that; was educated as a physician and chemist; am familiar with the use of cream of tartar and other dry acids in powder mixed with bicarbonate of soda, also in powder for the purpose of making dry powders to be used in raising bread; have been familiar with such use for over 25 years; it is a part of the education of a chemist to learn of such use of such dry powders, and of their being

385 combined in a dry state; druggists commonly sell these articles to be used in that precise manner. There are three acids that are commonly so used, and have been for over 25 years, viz, cream of tartar, tartaric acid, and citric acid. The office of each of these acids is precisely the same in the above-named combination; that is, to combine with the bicarbonate of soda, or other alkali, to effect the liberation of carbonic-acid gas in the dough. The office of Prof. Horsford's patent pulverulent phosphoric acid is the same, and nothing more. The dry phosphoric acid described in the formula of Benzaline, now shown me on page of Gmelin's Hand Book of Chemistry, is an acid which I recognize and understand as a chemist. It is substantially the very same acid as that described in Prof. Horsford's patent; that is to say, it is a dry or pulverulent phosphoric acid made from bones, only it is made by a differ-

386 ent process; but the office of Horsford's acid in a dry-bread preparation is precisely the same as that of Benzeline's acid, to wit, the liberation of carbonic-acid gas. While such an acid will combine with an alkali for the purpose stated as well as the other acids I have named, the result is not equally beneficial and useful, because the phosphoric acid is made from bones, is deleterious to health, and injurious to the human system. I have examined the Fowler patent referred to in this case and now shown me, and have compared it with Horsford's patent, and I find that the process of mixing the two ingredients of acid and alkali to form

the dry-bread preparation is substantially the same in both. Horsford's patent describes no invention or process that was not well known to chemists 25 years ago.

Cross-examined:

I have used Morgan's self-rising flour; used it once or twice when it first came out. Stopped using it because I felt satisfied the acid
387 in it was not healthful, but was injurious to the human system. It is true Horsford claims by his process to restore to the system the phosphates which are taken out of the wheat in the usual process of milling, and this is true as to a pure phosphoric acid; but I state as a chemist that Horsford's phosphoric acid, being made from bones, is not useful, but is injurious to health. I would as a chemist attach considerable weight to the opinion and assurance of Prof. Horsford if I had not found his theory of the usefulness of his acid unsound.

S. MANSFIELD testified:

Am a druggist; have been in constant business as such for 37 years; 33 years of that time in Memphis; am familiar with the use and sale of dry powders, composed either of cream of tartar or tartaric acid, on the one hand, and bicarbonate of soda on the other, for the purpose of mixing them in the dry state for raising bread, for over 30 years last past.
388 Druggists commonly sell such dry powders for such use. The dry acids I have known to be so sold and used were tartaric acid and cream of tartar. The formula of Berzelin's, now shown me, on page of Gmelin's Hand Book of Chemistry, I recognize as a process for preparing a dry phosphoric acid, which, if used in mixing with bicarbonate of soda, would produce just the same result as either cream tartar or tartaric acid, that is, the liberation of carbonic acid gas; I am familiar with the article known as Horsford's bread preparation, made and sold by the Rumford Chemical Works. It has been commonly kept for sale and sold in Memphis for the past 7 or 8 years. We buy it in New York.

W. Y. CRODE testified as follows:

I was assignee in bankruptcy of Allen F. Morgan. I did nothing with the patent right described in his schedule, because he, Morgan, told me that the patent belonged to some eastern chemical works, which he
389 had a contract with, binding him to buy the acid of that company; that the right was not transferable, because of conditions in the contract, and he had been notified by the chemical works that it claimed all his rights had been revoked. I did not sell it or attempt to sell it because he said it was not transferable. I found the mills in possession of Oliver, Finnie & Co., where Morgan was using them. I, as assignee, had a suit with W. B. Waldran about them, and by order of court in that case, I at private sale disposed of them to defendants, on the day of , as per bill of sale, as follows:

Sale.

CASE No. 822.

In the district court of the United States for the district of West Tennessee.

IN THE MATTER OF ALLEN F. MORGAN, BANKRUPT. } In bankruptcy.

DISTRICT OF WEST TENNESSEE, *ss.:*

On the 26th day of May, A. D. 1871, before me comes Wm. Y. Cirode, of Memphis, in the county of Shelby and State of Tennessee, and
390 makes oath and says that he was duly appointed the assignee of the above-named bankrupt, and that, as assignee, he has conducted the settlement of said estate. That in obedience to an order of this court, issued December 29, 1870, he sold at private sale two hand-mills and appurtenances, for the sum of one hundred and fifty dollars; one black mare mule for ninety-one dollars; one mule I exempted to Mrs. A. F. Morgan, as she is absent from Memphis; no further exemption has yet been made. The grey horse is reported dead. The refreshment stand at the Mississippi & Tennessee depot was leased by the company to A. F. Morgan, but said lease was cancelled before his bankruptcy. He demanded of E. Keck the two wagons in possession of said Keck, which he refused to give up, claiming a lien on same for storage; said Keck has the
391 wagons yet in his possession. Of this money received he has paid C. A. Choate, att'y, $25; Haynes & Stockton, att'ys, $25; keeping mules, $12.00; expense in getting mules, $4.35. All of which is most respecfully submitted.

W. Y. CIRODE, *Assignee.*

Testimony of Childs.

H. B. CHILDS testified:

I am a grocer in Memphis; I have sold dry acids and soda, especially cream of tartar, for 30 years, for making bread. I knew Allen F. Morgan; he was making self-*r*aising flour in 1864; he told me that the chief ingredients he used were cream of tartar and soda, but that he used them in combination with other ingredients; he said he was using "cream of tartar" and not "cream of tartar substitute." I regarded the business a humbug; Morgan then had one mill; the business afterwards increased.

Testimony of J. N. Oliver.

J. N. OLIVER testified:

392 I am one of defendants; the firm of Oliver, Finnie & Co., was formed latter part of January, 1869. I have been a grocer at Memphis since 1859; first as Oliver & Green. From 1861 to 1869; the firm was J. N. Oliver & Co., and as such we sold Morgan's self-*r*aising flour. He left it with us to be sold on commission. The firm of Finnie & Buckham were carrying on the grocery business at 284 Main st., until January 1, 1869.

Oliver, Finnie & Co. succeeded them. Morgan was in their employ, and when I went in a new arrangement was made. I was in New Orleans buying goods when Morgan died. I was to do all the purchasing. I heard of Morgan's death and came home in 3 or 4 days. The letter signed Oliver, Finnie & Co., addressed to Jno. Dwight & Co., dated April 20, 1869, is in the handwriting of Mr. Weston, of our firm. I never saw it be-
393 fore. I think the answer to it was received after my return from New Orleans. On my return I went to her house to see her to condole and sympathise with her, and I stated to her that if the Rumford Chemical Works were willing she should continue under the license, we were perfectly willing to continue the contract; that if Jno. Dwight & Co. said she could continue we would go on; if they did not, that would end it. I think I was here when John Dwight's letter of April 24 was received. In a few days I went to New York to purchase goods. Oliver, Finnie & Co. manufactured self-rising flour under a license from and contract with the Rumford Chemical Works.

Defendants introduced the license from the Rumford Chemical Works to Oliver, Finnie & Co., dated May 1st, 1869, and contract of same date as follows:

License.

To all men to whom these presence shall come:

394 Know ye that because the Rumford Chemical Works, a corporation located at and doing business in the town of East Providence, in the State of Rhode Island, has licensed and granted unto Joseph N. Oliver, James P. Finnie, and George M. Weston, composing the firm of Olver, Finnie & Co., of the city of Memphis, county of Shelby, and State of Tennessee, the exclusive right to manufacture, sell, and use during the time of five years from the date hereof the article known as self-rising flour from cereals by the use of Horsford's patent pulverulent phosphoric acid, in the following described territory, to wit: Beginning at the point where the northern boundary of the State of Tennessee touches the Mississippi River; thence southerly along the said river to and including Vicksburg; thence easterly along the line of the Mississippi Southern R. R. to Jackson; thence northerly along the line of the
395 Mississippi Central R. R. to Grenada; thence northeasterly to the junction of the eastern boundary line of Alabama with the southern boundary line of Tennessee; thence along the eastern boundary line of Middle Tennessee (so called) to the northern boundary line of Tennessee, and thence westerly along said boundary line to the point of beginning, and all the territory comprised within the boundaries of the State of Alabama, by an instrument in writing, bearing even date herewith, which is made a part of this agreement; and because of other good and sufficient reasons moving them thereto, that they have agreed, and by these presents do covenant and agree, to and with the aforesaid Rumford Chemical Works, that they will immediately commence the manufacture of self-raising flour in accordance with the written instructions furnished by the said Rumford Chemical Works as to proportions and quality of
396 flour, and that they will use all their business tact and skill, and all other means necessary to introduce and sell the same, and to

make the sale thereof as large as in any way possible in the territory aforesaid during the continuance of the license aforesaid and no longer, and to sell the said self-*ra*ising flour nowhere but in the territory specified, except upon the written consent of the said Rumford Chemical Works. And we further agree to accept in the aforesaid license such rights as are covered by the patents granted to Eben N. Horsford and by him assigned to the said Rumford Chemical Works, and to maintain them at our own cost and expense in suits at law whenever it shall be in our judgment necessary so to do, and to avail ourselves of such advice, counsel, and
397 assistance as the said Rumford Chemical Works may elect to give in said suits, and to purchase all the acid used in making our said self-*ra*ising flour of the Rumford Chemical Works or of their agents, as directed, and that in case of our failure to perform the covenants and agreements hereby entered into it shall be lawful for the said Rumford Chemical Works to annul and revoke their said license to us and to terminate this agreement.

The use of said phosphoric acid by families for domestic purposes shall not be construed as a violation of this agreement.

In testimony whereof the parties hereto have hereunto affixed their hand and seal this first day of May, A. D. 1879.

OLIVER, FINNIE & CO.

Signed, sealed, and delivered in presence of—

398 The witness Oliver, continues: When this license expired, we got a renewal of it; now have license from the Rumford Chemical Works, but for the last two years we have not used the Rumford acid in preparing self-rising flour. We have used cream of tartar and bicarbonate of soda. I have known of the use of cream of tartar and soda for making flour self raising since I was a boy. We found that the flour made with the Rumford acid did not give satisfaction after it had been mixed a short time. The acid loses its strength when exposed to the air; all the cans and bottles in which it is put for the market are hermetically sealed, which is not the case with any other baking powder. We used our utmost skill and did everything in our power to make the business a success; sent out circulars, advertised in newspapers, sent out agents
399 to 50 places. We often had to take flour back. We were careful in our expenditures and watched it as carefully as any business could be. It has been an absolute loss and failure every year. We hoped by carrying it on with our other business to make something of it. We now sell it as called for; do not send out any agents. It takes 4 lbs. 5 oz. of acid to prepare a barrel of flour; that cost us 25 to 28 cents in New York, with freight, &c., added; it cost 27 to 30 cents a pound; the soda to be used with it cost 13 cents a bbl., and the salt ten cents. We employed two men to mix the flour; they could prepare eight barrels a day. We sold it at an advance of $4 a barrel until 1873, when we sold it at $3. This was when we retailed it; most of our sales were to the trade, when we always sold at $1.00 less than to others. We kept a self-raising flour account, and I have in my hand the book containing
400 a detailed account of the business, and shewing all the expenses and receipts. We usually made enough so as to keep about 10 bbls. on hand, except, when we first started, a larger quantity was made

and sent to Nashville, and other places. I, nor anyone of my firm, so far as I know, ever said one word to the Rumford Chemical Works' officers, or John Dwight & Co., to dissuade them from allowing Mrs. Morgan to continue under the license. She never gave us any notice that we were infringing her patent; all that was said by her to me about her rights were those claimed under the contract.

The witness stated on cross-examination:

After Morgan's death we had two hands and a foreman—a white man—
all the time. After Ware left we had D. Rogers for 5 years;
401 Morgan had two darkies, Ware, and himself. After my return
from New York, in the spring of 1869, a friend of Mrs. Morgan's—
I think his name was Crocker—came and asked me to go and see her, & I went with him to her house. They wanted me to allow Mrs. Morgan 25 cents a barrel on all we manufactured during the time covered by the contract. I refused to do it. We made 1,200 barrels during that time. We were indifferent as to whether Mrs. Morgan got the license or we got it. We had invested considerable in it, about $500.00, and if John Dwight & Co., who were the agents of the Rumford Chemical Works, were going to take it away from Mrs. Morgan we wanted it. We could have carried on the business without a license, as this acid was sold openly in the New York market and other markets. If Mr. Finnie and Mr.
Weston state, in answer to the bill of discovery, that we could not
402 have carried on the business without a license from the Rumford
Chemical Works, it was because the' did not know that the acid could have been purchased elsewhere. I knew it. From April 1, 1870, the business decreased 35 % from what it was the year before. The next year it increased $152.00 over the year just preceding. The next year it decreased, that (2d) year, 15 %. The fourth year it decreased 36 per cent., 3d year. The 5' year it increased $932.00 in amount of sales. Since that time there has been a gradual decrease of more than 10 % a year on an average. We always used the best of flour.

The defendants then offered in evidence the whole record in the case of Kate G. Morgan, adm'x, v. Oliver, Finnie & Co. in the first circuit court of Shelby County, as follows:

RECORD 1ST CIR. C'T SHELBY CO.

In the first circuit court of Shelby County.

MRS. KATE G. MORGAN, ADM'X, &C., A. F. Morgan, dec'd,
v.
OLIVER, FINNIE & CO.

403 The plaintiff, Mrs. Kate G. Morgan, administratrix of the estate of Allen F. Morgan, dec'd, sues the defendants, Jos. N. Oliver, Jas. P. Finnie, and G. M. Weston, partners, doing business as Oliver, Finnie, & Co., for $15,000, and says, that on the 15th day of February, the said defendants, under their said firm name, made and entered into a contract with plaintiff's intestate, the said A. F. Morgan, and during the life-

time of said A. F. Morgan, in writing, which is here to the court shown, and which is in the words and figures following, to wit:

"This agreement is entered into by and between Allen F. Morgan, of the city of Memphis, county of Shelby, and State of Tennessee of the first part, and Jos. N. Oliver, Jas. P. Finnie, and G. M. Weston, partners together in business, under the firm name of Oliver, Finnie & Co., all of the city of Memphis, county of Shelby, State of Tennessee, of the second part. The agreement between the aforesaid parties is for the purpose of having prepared, in connection with the grocery business of the parties of the second part, which is known as self-rising flour, by the party of the first part, for preparing said flour by the Rumford Chemical Works, a corporation situated and doing business in the town of East Providence and State of Rhode Island. The party of the first part agrees to furnish the necessary flour-preparing mills, all tools, fixtures, and implements needed by himself with which to prepare said flour in a complete and proper manner, and in such quantities as the trade or sale of same may demand; also to furnish his own time and supervision of the business; and, in case of absence, to fill his place with a competent man, who shall be wholly acceptable to the parties of the second part; also to furnish at his own expense all the labor or laborers he may require in the business; also to keep himself possessed of the right to prepare such flour, and have the privilege of purchasing the ingredients for the same, and to defend his right in suits at law, at his own expense; also to be ready to prepare all flour offered by the parties of the second part (which it is here agreed, by all the parties to this contract, that the party of the first part shall be allowed at his option or discretion to refuse to prepare any flour offered by the parties of the second part which in his judgment is not of sufficient good quality to maintain the good character and popularity of the flour), and put it in any of the following size packages as demanded by the parties of the second part, to wit, whole and half-barrels, (48) forty-eight, (24) twenty-four, (12) twelve, and (6) six, pound packages. The parties of the second part agree to furnish at their own expense all the flour and buckwheat flour (of acceptable quality, to the party of the first part) that may be demanded by the sale or trade for said self-rising flour and buckwheat. Also to furnish all the ingredients used in the preparation of the said flour and buckwheat; also all the cotton and paper bags and sacks required; also all the fuel and lights needed or required by the said flour business, to furnish ample room in the rear part of store-room No. 284 Main st. in which to do the work of preparing said flour; said room to be free of rent to the party of the first part; also to pay each and every license, tax, or assessments, on such business made by the United States or Tennessee State governments, or by the county of Shelby or city of Memphis; also to keep at all times during the continuance of this agreement the machinery, tools, implements, &c., belonging to the party of the first part insured in a good and solvent insurance company for $500, said insurance to be paid by the parties of the second part; and in case of their destruction or damage by fire, or its consequences, the said insurance money shall be paid over to the party of the first part by the parties of the second part immediately upon its collection from the insurance company. The parties of the second part especially agree that they will not severally, jointly,

or immediately, or through other parties or party, or in any manner become competitor or bidders against said party of the first part for his exclusive right to prepare self-rising flour with Eben N. Horsford's patent cream tartar substitute, at the assignee's sale of the same in the bankrupt case of the party of the first part, or in any other way or manner whatsoever. The parties of the second part further agree to advertise said flour well and liberally at their own expense, and to do all in their power and means to advance the demand for and sale of self-rising flour and to pay the party of the first part for each and every barrel of wheat flour and buckwheat
408 flour prepared by him or under his right the sum of $1.25. This agreement is entered into by all the parties to it, to remain in full force and effect until the 1st April, 1870, but it is further agreed that should any change occur before that date in the present firm of Oliver, Finnie & Co., involving the addition or the retirement of a partner to or from said firm, this contract from the date of said change shall be null and void, and of no force. Signed in duplicate and subject to such additions and amendments as shall hereafter be mutually agreed to and entered upon both sheets of this agreement, and over the signature of all the parties to this agreement.

Signed in the presence of these witnesses this 15th day of February, 1869.

"OLIVER, FINNIE & CO. [SEAL.]
"ALLEN F. MORGAN. [SEAL.]

"Attest:
"W. S. FRITH.
"J. F. BUCKHAM."

And the said plaintiff alleges that her said intestate, Allen F. Morgan, did and performed all that devolved upon him to do by the
409 terms of said contract, to wit: He furnished the necessary flour, preparing mills, tools, fixtures, and implements needed to prepare what is known as self-rising flour in a complete and proper manner, as the sale or trade thereof demanded. He furnished his own time and supervision of the business, and when he was absent he furnished a competent man as his substitute up to the time of his death, to wit, the 19' day of April, 1869. He furnished all the labor or laborers that were necessary to carry on said business, and kept himself possessed of the right to prepare such flour and the privilege to purchase the ingredients for the same, and was ready at all times to prepare all suitable flour that was offered him and put the same in such packages as the defendants required up to said time of his death; and since the death of said Morgan plaintiff has
410 tendered in writing to the defendants to carry out the terms of said contract to the expiration thereof, to wit, the 1st day of April, 1870. And plaintiff alleges that said defendants have wholly failed and refused, though demanded to do so, to comply with said contract according to the terms thereof in divers ways, but especially in not paying to plaintiff's intestate during his life, and to plaintiff since the death of her intestate, the agreed price of $1.25 per barrel for all wheat flour and buckwheat flour manufactured by them under the terms of said contract, which plaintiff alleges to have been 10,000 barrels of wheat flour and 10,000 barrels of buckwheat flour, to plaintiff's damage, $15,000.

2d. And plaintiff sues the said defendants for the further sum of $15,000,

and says that sum is due her on a written contract, here to the court shown, made and entered into on the 15th day of February, 1869, by and between said defendants and plaintiff's intestate, Allen F. Morgan, and
411 in the life-time of said Morgan, under and by virtue of which contract it was agreed between said parties that they, the said Morgan and the defendants were to manufacture and prepare for sale what is known as self-rising flour, and that the said defendants would furnish all the wheat flour and buckwheat flour, and all ingredients of every kind, and pay all expenses that may be incurred in or be necessary to carry on said business successfully, and for each barrel of wheat flour and buckwheat flour so manufactured the said defendants agreed to pay and became bound to pay plaintiff's intestate, the said A. F. Morgan, during his life-time, and to plaintiffs, since his death, the sum $1.25; and plaintiff says that said defendants have manufactured under said contract 10,000 barrels of wheat flour and 10,000 barrels of buckwheat flour, for which they owe plaintiff $15,000, and therefore plaintiff sues.

412 3d. And the plaintiff sues the defendants for the further sum of $15,000 for work and labor done by her intestate during his life-time for and on behalf of the defendants and at their instance and request, and for money had and received by said defendants for and on behalf of plaintiff and of plaintiff's intestate, said A. F. Morgan; wherefore plaintiff sues, &c.

Plaintiff says her said intestate, Allen F. Morgan, departed this life on the 19th day of April, 1869, and at the term of the county court she was duly appointed and qualified as his administratrix, and here shews into court her letters of administration.

STEVENS AND SMITH,
W. G. RAINEY,
Attos. for Pl'ff.

(Endorsed:) 507. Mrs. Kate G. Morgan, adm'x v. Oliver, Finnie & Co. Declaration. Filed Jan'y 18th, 1871. Frank Taft, clerk, by L. E. Boswell, d. c.

413 *Pleas.*

KATE G. MORGAN, ADM'X OF ALLEN F. MORGAN, *v.* OLIVER, FINNIE & CO. } First circuit court.

The said defendants for plea say that they did not undertake, agree, or covenant as the plaintiff hath in her declaration alleged.

And for further plea to the first and second counts of said declaration, the said defendants say that they never made or executed any such contract or contracts as in said first and second counts are alleged and set forth.

And for further plea to said first and second counts, defendants say that they paid to said plaintiff's intestate in his life-time, and to said plaintiff as administratrix as aforesaid since his death, the sum of $1.25 for each and every barrel of wheat flour and buckweat flour manufactured under the contracts in the said first and second counts set forth and alleged.

And for a further plea the said defendants, as to the said first coun$_t$

414 of the said declaration, say that plaintiff's intestate did not perform all that devolved upon him to do by the terms of the alleged contract in said count set forth, and did not furnish the necessary flour, preparing mills, tools, fixtures, and implements needed, and did not keep himself possessed of the right to prepare such flour, and to use the ingredients necessary therefor as in said count is in that behalf alleged.

And for a further plea the said defendants, as to the said third count of the said declaration, say that they fully paid the demands in the said third count set forth and alleged before this action was commenced.

EJLET & PHELAN,
PIERCE, RICHARDS & DIX,
For Defendants.

For replications to the pleas of the defendants filed herein, the plaintiff denies the truth of all the above pleas.

STEPHENS & SMITH,
W. G. RAINEY, *for Pl'ff.*

(Endorsed:) Kate G. Morgan, adm'x, v. Oliver, Finnie & Co.
415 Pleas. Filed Jan'y 20th, 1871. Frank Taft, clerk, by L. E. Boswell, d. c. Replication filed Jan'y 24th, 1871. L. E. Boswell, d. c.

Bill of exceptions.

First circuit court of the county of Shelby.

KATE G. MORGAN, ADM'X,
v.
OLIVER, FINNIE & CO.

Be it remembered that on the trial of the foregoing cause, at the January term, 1872, of the said court, the said plaintiff proved that Allen F. Morgan, her intestate, died on the 19th day of April, A. D. 1869, and that she was appointed and qualified as his administratrix on the 9th day day of June, 1869.

Said plaintiff also read in evidence to the jury the written agreement sued on in the words and figures following, to wit:

A.

This agreement is entered into by and between Allen F. Mor-
416 gan, of the city of Memphis, county of Shelby and State of Tennessee, of the first part, and Jos. N. Oliver, Jas. P. Finnie, and G. M. Weston, partners together in business under the firm name of Oliver, Finnie & Co., all of the city of Memphis, county of Shelby and State of Tennessee, of the second part.

[2. 2. U. S. int. rev. stamp. 2. 2.] [2. 2. U. S. int. rev. stamp. 2. 2.] [2. 2. U. S. int. rev. stamp. 2. 2.]

This agreement between the aforesaid parties is for the purpose of having prepared, in connection with the grocery business of the parties of the second

part, what is known as self-rising flour by the party of the first part, under and by authority of the exclusive privilege granted to the party of the first part for preparing said flour by the Rumford Chemical Works, a corporation situated and doing business in the town of East Providence, Rhode Island. The party of the first part agrees to furnish the necessary flour-preparing mills, all tools, fixtures, and implements needed by himself with which to prepare said flour in a complete and proper
417 manner, and in such quantities as the trade or sale of same may demand; also to furnish his own time and supervision of the business, and in case of absence to fill his place with a competent man, who shall be wholly acceptable to the parties of the second part; also to furnish at his own expense all the labor or laborers he may require in the business; also to keep himself possessed of the right to prepare such flour and have the privilege of purchasing the ingredients for the same, and to defend his right in suits at law at his own expense; also to be ready to prepare all flour offered by the parties of the second part (which it is here agreed by all the parties to this contract, that the party of the first part shall be allowed at his option or discretion to refuse to prepare any flour thus offered by the parties of the second part which in his judgment is not of sufficient good quality to maintain the good character and popularity of the flour), and put it in any of the
418 following size packages as demanded by the parties of the second part, to wit: whole and half barrels, forty-eight (48), twenty-four (24), twelve (12), and six (6) pound packages. The parties of the second part agree to furnish at their own expense all the flour and buckwheat flour (of acceptable quality to the party of the first part) that may be demanded by the sale or trade for said self-rising flour and buckwheat; also to furnish all the ingredients used in the preparation of the said flour and buckwheat; also all the cotton and paper bags and sacks required; also all fuel and lights needed or required by the said flour business; to furnish ample room in the rear part of store No. 284 Main street, in which to do the work of preparing said flour, said room to be free of rent to the party of the first part; also to pay each and every license, tax, or assessment on such business made by United States or Tennessee State Governments, or by the county of Shelby or city of Memphis;
419 also to keep at all times during the continuance of this agreement, the machinery, tools, implements, &c., belonging to the party of the first part, insured in a good and solvent insurance company for five hundred dollars ($500), said insurance to be paid for by the parties of the second part, and in case of their destruction or damage by fire, or its consequences, the said insurance money shall be paid over to the party of the first part by the parties of the second part immediately upon its collection from the insurance company. The parties of the second part specially agree that they will not severally, jointly, or individually, or through other party or parties, or in any manner become competitors or bidders against said party of the first part for his exclusive right to prepare self-rising flour with Eben N. Horsford's patent cream tartar substitute, at the assignee's sale of same in the bankrupt case of the party of the
420 first part, or in any other way or manner whatsoever. The parties of the second part further agree to advertise said flour well and liberally at their own expense, and to do all in their power and means

to advance the demand for and sale of the self-rising flour, and to pay to the party of the first part for each and every barrel of wheat flour and buckwheat flour prepared by him or under his right the sum of one dollar and twenty-five cents ($1.25). This agreement is entered into by all the parties to it to remain in full force and operation till the first (1st) day of April, eighteen hundred and seventy (1870), but it is further agreed that should any change occur before that date in the present firm of Oliver, Finnie & Co., involving the addition of or the retirement of a partner to or from said firm, this contract from the date of said change shall become null and void and of no force. Signed in duplicate and subject to such additions and amendments as shall hereafter be mutually agreed to and entered upon both sheets of this agreement, and over the signatures
421 of all the parties to this agreement.

OLIVER, FINNIE & CO. [SEAL.]
ALLEN F. MORGAN. [SEAL.]

Signed in presence of these witnesses, this 15th day of February, 1869.

Attest:
W. S. FRITH.
J. F. BUCKKHAM.

[2. 2. Int. rev. 2. 2.] [2. 2. Int. rev. 2. 2.] [2. 2. Int. rev. 2. 2.]

422 Plaintiff also read in evidence a copy of letters patent to E. N. Horsford, dated 14th April, 1868, as follows, to wit:

B.

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted E. N. Horsford, dated April 14th, 1868, No. 76763, for "Imp'd method of preparing acid phosphate of lime." In testimony whereof I, Sam'l A. Duncan, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed the fourth day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-sixth.

SAM'L A. DUNCAN,
Acting Commissioner.

No. 76763.

The United States of America to all to whom these letters patent shall come:

423 Whereas E. N. Horsford, of Cambridge, Massachusetts, has alleged that he has invented a new and useful improved method of preparing acid phosphate of lime, and has made out that he is a citizen of the United States; that he verily believes he is the original and first inventor or discoverer of the said invention, and that the same hath not to his knowledge and belief been previously known or used; has paid into

the Treasury of the United States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents praying that a patent may be issued therefor. These are, therefore, to grant to the said E. N. Horsford, his executors, administrators, or assigns, for the term of seventeen years from the fourteenth day of April, one thousand eight hundred and sixty-eight, the full and exclusive right and liberty of making, using, and vending to others to be used the said invention, a description whereof is given in the annexed schedule and made a part of these presents.

424 In testimony whereof I have caused these letters to be made patent and the seal of the Patent Office to be hereunto affixed.

Given under my hand, at the city of Washington, this fourteenth day of April, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-second.

W. F. OTTO,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.
[L. S.]
A. M. STOUT.
Acting Commissioner of Patents.

UNITED STATES PATENT OFFICE.

Eben N. Horsford, of Cambridge, Massachusetts. Letters patent No. 76763, dated April 14, 1868. Improved method of preparing acid phosphate of lime.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, Eben N. Horsford, of Cambridge, in the
425 county of Middlesex, and the State of Massachusetts, have invented a new and improved method of preparing acid phosphate of lime; and I do hereby declare that the following is a full and exact description thereof. My invention consists in the use or employment of a pure or purified sulphuric acid, in the manufacture of pulverulent acid phosphate of lime, when sucid acid phosphate is so manufactured as to contain gypsum or sulphate of lime, derived from the phosphate of lime used in making said pulverulent and acid phosphate for the purpose of raising bread; commercial and ordinary oil of vitriol contains a proportion of sulphate of lead, which is highly poisonous, and therefore unsuited to be employed in the manufacture of articles of food. Such oil of vitriol has been heretofore used by me in the manufacture of pulverulent acid phosphate of lime, when so manufactured, as to contain gypsum or sulphate of lime derived from the
426 phosphate of lime used in making said pulverulent acid for the purpose of raising bread. It has, however, proved that bread raised by such acid phosphate of lime is poisonous. In order to be able to use such acid phosphate of lime for this purpose, I made an improved process of manufacturing the same by depriving the oil of vitriol of its sulphate of lead before using it in making said acid phosphate.

My process for eliminating the sulphate of lead is as follows: After having determined the quantity of sulphuric acid to be employed in the

operation, I dilute the oil of vitriol or commercial sulphuric acid with pure water until the sulphate of lead is precipitated. The usual mode, after having ascertained the proportion of water to oil of vitriol, is to pour the oil of vitriol in a slender stream into the water, with constant stirring.

When the sulphate of lead has settled out, I draw off the diluted
427 acid, which may or may not be thereafter concentrated in appropriate vessels. I do not confine myself to this method of separating the sulphate of lead from oil of vitriol, or to any particular method. I then proceed, as follows: I dissolve phosphate of lime derived from burned bones or mineral sources in nitric hydrochloric or other volatile acid, diluted with an adequate quantity of water, making a saturated or nearly saturated solution. This solution I filter to remove any solid impurities that may be present, and add in proper proportion to the filtered liquor the sulphuric acid freed of its lead, as above described. There results an immediate precipitation of sulphate of lime, with the disengagement of the volatile acid employed to dissolve the phosphate of lime. On

the application of heat the volatile acid and water are expelled, and
428 there remain acid phosphate of lime and sulphate of lime, with traces of other salts in condition to be readily reduced to powder. What I claim and desire to secure by letters patent of the United States, as my invention, is: The use of sulphuric acid or oil of vitriol of of commerce, purified as above described, to be employed in the manufacture of pulverulent acid phosphate of lime, when such acid phosphate is so manufactured as to contain gypsum or sulphate of lime derived from the phosphate of lime used in making said pulverulent acid phosphate, for the purpose of raising bread.

E. N. HORSFORD.

Witnesses:
GEO. F. WILSON.
M. G. HOWE.

429 Plaintiff also read in evidence a copy of an assignment of the same and other patents by E. N. Horsford to the Rumford Chemical Works, dated 28th July, 1868, in words and figures following, to wit:

C.

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office.

In testimony whereof I, Sam'l A. Duncan, Acting Commissioner of Patents, have *annexed* the seal of the Patent Office to be hereunto affixed the third day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-sixth.

[L. S.] SAM'L A. DUNCAN,
Acting Commissioner.

(V. 10, p. 80.)

Whereas I, Eben N. Horsford, of Cambridge, in the county of Middlesex,

and State of Massachusetts, did obtain certain letters patent of the
430 United States for certain inventions and improvements in the manufacture and use of phosphoric acid and acid phosphates of lime, which letters patent bear date, and are numbered as hereafter described; and whereas the Rumford Chemical Works, a corporation doing business in the town of East Providence, county of Providence, and State of Rhode Island, is desirous of acquiring an interest therein: Now, this indenture witnesseth that for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I have assigned, sold, and set over, and do hereby assign, sell, and set over unto the said Rumford Chemical Works all the right, title, and interest which I have in the said inventions as secured to me by said letters patent for, to, and in the United States. The same to be held and enjoyed by the said Rumford Chemical Works for its own use and behoof, and for the use and behoof of its successors and assigns to the full end of the
431 term for which said letters patent are granted, and for the term of any extension thereof as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale been made; and the said aforementioned patents were granted for the following-described purpose, and are numbered and dated as follows, viz:

No. 18203, dated Sept. 15, 1857, for an improvement in treating cotton and linen waste.

No. 39922, dated Sept. 15, 1863, for the manufacture and use of neutral sulphite of lime.

No. 75272, dated March, 1868, for improved manufacture of acid phosphates to be used in food.

No. 75271, dated March 10, 1868, for an improved preparation of acid phosphate of lime.

No. 76763, dated April 14, 1868, for an improved method of preparing acid phosphate of lime.

In testimony whereof I hereunto set my hand and affix my seal
432 this twenty-eighth day of July, A. D. 1868.

E. N. HORSFORD. [SEAL.]

Signed, sealed, and delivered in presence of—
A. POLLOK.

[5 cts. 5. July 28, 1868. E. N. H. 5 cts. 5.]

Recorded Aug. 17, 1868. Ex'd, J. A. A.

433 Plaintiff then read in evidence a paper purporting to be an assignment by the Rumford Chemical Works to Allen F. Morgan, of the right to use Horsford's patent cream of tartar substitute for manufacturing self-rising flour within the territory named therein, dated the 1st day of February, 1869, for the period of five years from date; and also the agreement of said Morgan respecting the use of said article, of same date, in the words following, to wit:

D.

To all people to whom these presents shall come The Rumford Chemical Works, a corporation transacting business in East Providence, in the State of Rhode Island, sends greeting:

Know ye, that the said corporation in consideration of the agreement of

even date herewith entered into by and between it and Allen F. Morgan, of Memphis, in the county of Shelby and State of Tennessee, does hereby
434 sell, assign, and transfer unto the said Allen F. Morgan the right to use within the territory described in the said agreement, Horsford's patent cream of tartar substitute, for the purpose of manufacturing within said territory self-raising cereal flours, with the right to use and sell the flours so manufactured, to have and to hold and exercise such right within the limits aforesaid, for and during the time, and under and subject to the conditions and limitations named and specified in the agreements aforesaid, of even date herewith, to which reference is hereby made as a part hereof.

In testimony whereof the said corporation have caused these presents to be signed and its corporate seal to be hereunto affixed on this first day of February, A. D. eighteen hundred and sixty-nine, by George F. Wilson, its treasurer and agent for this purpose duly authorized.

GEO. F. WILSON, *Treas'r.* [L. S.]

Signed, sealed, and delivered in presence of—
WILLIAM S. LYON.

435 E.

To all men to whom these presents shall come:

Know ye, that because the Rumford Chemical Works, a corporation located at and doing business in the town of East Providence, in the State of Rhode Island, has licensed and granted unto Allen F. Morgan, of the city of Memphis, county of Shelby, and State of Tennessee, the exclusive right to manufacture, sell, and use, during the time of five years from the date hereof, the article known as self-rising flour from cereals, by the use of Horsford's patent pulverulent phosphoric acid, in the following described territory, to wit: Beginning at the point where the northern boundary of the State of Tennessee touches the Mississippi River; thence southerly along the said river to and including Vicksburgh; thence easterly along the line of the Mississippi Southern R. R. to Jackson; thence northerly along the line of the Mississippi Central R. R. to Granada; thence northeasterly to the junction of the eastern boundary line
436 of Alabama with the southern boundary line of Tennessee; thence along the eastern boundary line of Middle Tennessee (so called) to the northern boundary line of Tennessee, and westerly along said boundary line to the point of beginning, by an instrument in writing bearing even date herewith, which is made a part of this agreement, and because of other good and sufficient reasons moving him thereto, that he has agreed, and by these presents does covenant and agree, to and with the aforesaid Rumford Chemical Works, that he will immediately commence the manufacture of self-raising flour in accordance with the written instructions furnished by the said Rumford Chemical Works, as to proportions and quality of flour, and that he will use all his business tact and skill, and all other means necessary to introduce and sell the same, and to make the sale thereof as large as in any way possible in the territory aforesaid, during the continuance of the license aforesaid, and no longer,
437 and to sell the said self-raising flour nowhere but in the territory specified, except upon the written consent of the said Rumford

Chemical Works. And I further agree to accept in the aforesaid license such rights as are covered by the patents granted to Eben N. Horsford, and by him assigned to the said Rumford Chemical Works, and to maintain them at my own cost and expense in suits at law, whenever it shall be in my judgment necessary so to do, and to avail myself of such advice, counsel, and assistance as the said Rumford Chemical Works may elect to give in said suits; and to purchase all of the acid used in making our said self-raising flour of the Rumford Chemical Works or their agents, as directed; and that in case of my failure to perform the covenants and agreements hereby entered into, it shall be lawful for the said Rumford Chemical Works to annul and revoke their said license to me, and to
438 terminate this agreement. The use of said phosphoric acid by families for domestic purposes shall not be construed as a violation of this agreement.

In testimony whereof the party hereto has hereunto affixed his hand and seal this first day of February, A. D. 1869.

ALLEN F. MORGAN.

[Stamp.]

Signed, sealed, and delivered in presence of—
Att: J. P. FINNIE.

439 KATE G. MORGAN, ADM'X,
vs.
OLIVER, FINNIE & CO.

This day came the parties by their attorneys, and also come the following jury, to wit: Geo. Provise, W. V. Allen, J. W. Carroll, S. Besthorf, J. W. Jones, W. A. Ammon, J. A. Strehl, W. H. Taylor, A. F. Crego, L. C. Hardwick, J. R. Reed, and R. H. Williams, who being elected, tried, and sworn, &c., on their oaths say:

"We, the jury, find that A. F. Morgan made 401 barrels of flour from the 15th of February, 1869, to the 19th of April, 1869, making $501.25, at $1.25 per barrel. We also find that A. F. Morgan received from Oliver, Finnie & Co. $552.58. We also find that Oliver, Finnie & Co. made from 1st of May, 1869, to 1st April, 1870, 1,213 barrels of flour, which at $1.25 per barrel makes $1,516.25, which amount, if in the opinion of the court the law is for the plaintiff, we find for the plaintiff, other-
440 wise we find for the defendants. We also find that 200 barrels per month ought to have been made for 11⅓ months, which would make 2,266 barrels, at $1.25 per barrel, in all $2,832.50, which, if in the opinion of the court the law is for the plaintiff, we find for the plaintiff, if otherwise we find for the defendants."

And thereupon the said defendants moved the court to set aside the said verdict, and grant a new trial for the following reasons, to wit:

1. Because the proof showed that the amount received by A. F. Morgan from Oliver, Finnie & Co. greatly exceeded the sum of $552.58 found by the jury.

2. Because in finding the amount of self-rising flour prepared, and also in finding the amount which ought to have been prepared by Oliver, Finnie & Co. after the death of A. F. Morgan, the jury erroneously allowed for the whole time, when the proof shewed that there was no adminis-

441 tration on the estate of said Morgan until the 9th of June, 1869, and that no offer to perform the contract was made by his administratrix until August 2d, 1869, after his death.

3. Because there was no proof how much flour could or ought to have been prepared beyond what was actually prepared. And thereupon the plaintiffs remitted $120.00 of her said recovery. And the said motion having been heard and considered by the court, it is ordered that the same be overruled and a new trial refused, to which the defendants then and there excepted.

And now the court being further of opinion upon the evidence given on the trial of the said cause that the law upon the said finding of the jury is for the plaintiff, and that she is entitled at the rate of $1.25 per barrel on the 401 barrels made before the death of her intestate, and at the same rate upon 2,266 barrels which the defendants ought to
442 have made from 19' April, 1869, to 1st April, 1870, making in all $3,333.75, and that the defendants are entitled to a deduction of the sum of $552.58, which leaves $2,781.17, and the plaintiff having remitted $120 part thereof: It is therefore ordered and adjudged that the plaintiff recover of the defendants the said sum of twenty-six hundred and sixty-one $\frac{17}{100}$ dollars and the costs, and that execution issue; and the defendants tender their bill of exceptions herein, which is signed, sealed, and made part of the record in this cause.

443 *Procedendo.—Filed July 22d*, 1872.

THE STATE OF TENNESSEE:

Pleas before the supreme court of said State, for the western division thereof, at Jackson, on the first Monday in April, 1872.

Present, the honorable A. O. P. Nicholson, chief justice, and James W. Deaderick, Thomas J. Freeman, John L. T. Sneed, Robert McFarland and Peter Turney, associate judges, to wit, Tuesday, June the 4th, 1872.

1st cir. c't, Shelby Co.

OLIVER, FINNIE & CO.
vs.
MRS. KATE MORGAN, ADM'X OF A. F. MORGAN, dec'd. } No. 198.

The parties appear by their attorneys, and therefore the record, proceedings, and judgment of the court below, in this cause, being seen and fully understood by this court, and it appearing that in the same there is error, it is therefore considered by the court that the judgment
444 aforesaid be reversed and annulled, and this cause remanded to the first circuit court of Shelby County for a new trial therein, in accordance with the opinion of this court delivered in the cause. It is further considered that the defendant in error pay the cost of the cause in this court, for which let execution issue, to be levied of the goods and chattels, rights, and credits of her intestate, in her hands to be administered.

OLIVER, FINNEY & CO.
vs.
KATE G. MORGAN, ADM'X, &C.

Opinion.

On the 14th of April, 1868, a patent issued to E. N. Horsford, his executors, adm'rs, or assigns, by which was secured to him the full and exclusive right and liberty of making, using, and vending the invention of preparing acid phosphate of lime for the purpose of raising bread. On the 28th of July, 1868, Horsford assigned, sold, and set over to
445 the Rumford Chemical Works all his right, title, and interest in the said invention, to be held for their own use and that of their successors and assigns. On the 1st of July, 1869, the Rumford Chemical Works, in consideration of the agreement of even date, entered into with Allen F. Morgan, sold, assigned, and transferred to the said Morgan the right to use, within prescribed limits of territory, Horsford's patent cream of tartar substitute, for the purpose of manufacturing self-*r*aising cereal flours, with the right to use and sell the flours so manufactured. The agreement of even date recited that because the Rumford Chemical Works have licensed and granted unto Allen F. Morgan, the exclusive right to manufacture, sell, and use, during the time of five years from the date thereof, the article known as self-*r*aising flour from cereals, by the use of Horsford's patent pulverulent phosphoric acid, in the ter-
446 ritory described, and because of other good and sufficient reasons, he has agreed, and doth covenant and agree to and with the Rumford Chemical Works, that he will immediately commence the manufacture of self-*r*aising flour in accordance with the written instructions of said Rumford Chemical Works, and will use his business tact and skill to introduce and sell the same during the continuance of the license aforesaid. And the said Allen F. Morgan further agrees to accept in the aforesaid license such rights as are covered by the patents granted to Eben N. Horsford and by him assigned to said Rumford Chemical Works, and to maintain them at his own costs and expense in suits at law; and to purchase all of the acid used in making his said self-*r*aising flour of the Rumford Chemical Works, or their agents, as directed, and in case of his failure to perform the covenants and agreements thereby entered into, it
447 should be lawful for the Rumford Chemical Works to annul and revoke their said license and to terminate the agreement.

On the 15th of February, 1869, an agreement was made between Morgan, of the first part, and Oliver, Finnie & Co., of the second part, for the purpose of having prepared, in connection with the grocery business of Oliver, Finnie & Co., the self-*r*aising flour, under the authority of the exclusive privilege granted to Morgan for preparing said flour. Morgan agrees to furnish the necessary flour, preparing mills, all tools, fixtures, and implements needed by himself with which to prepare the flour. He was also to furnish his own time and supervision of the business, and in case of absence to fill his place with a competent man, and to furnish, at his own expense, all the labor or laborers he may require in the business; also to keep himself possessed of the right to prepare such flour, and the
448 privilege of purchasing the ingredients, &c. Oliver, Finnie & Co.

were to furnish, at their own expense, all the flour and buckwheat demanded by the sale or trade for the self-raising flour, and to purchase all the ingredients, and the cotton and paper bags, fuel, lights, and ample room in their store; to pay all taxes, insurance, and not to become competitors or bidders against said Morgan for his exclusive right to prepare self-rising flour at the assignee's sale of same in the bankrupt case of Morgan, or in any other way or manner whatever. They agree to pay to Morgan for every barrel of wheat flour and buckwheat flour prepared by him or under his right the sum of $1.25, the agreement to remain in force until the 1st of April, 1870. Under this agreement the business of preparing the self-rising flour was carried on until the 19th of April, 1869, two months and a few days, when Morgan died. Oliver, Finnie & Co. continued the business after his death, having immediately procured from the
449 Rumford Chemical Works a contract similar in all respects which Morgan had with them, they assuming that their contract with or license to Morgan was annulled and revoked by his death. In June, 1869, Kate G. Morgan administered on the estate of her husband, Allen F. Morgan, claimed the right to carry out the contract between him and Oliver, Finnie & Co., and offered to them to superintend the business and execute the agreement of her intestate. Oliver, Finnie & Co. denied her right to execute the agreement; insisted that her intestate's interest was merely a license, which was terminated by his death, and that they had the right to carry on the business under their arrangement with the Rumford Chemical Works. She thereupon commenced her suit in the first circuit court of Shelby County, on the article of agreement entered into between her intestate and Oliver, Finnie & Co., claiming compensation according to agreement for $1.25 on each barrel of flour so prepared,
450 from the date of the agreement down to the 1st of April, 1870, when the agreement expired. Upon the trial, under the instructions of the court, the jury found a special verdict, as follows: That from the 15th of February, 1869, to the 19th of April, 1869, Morgan made 401 barrels of flour, making $501.25, at $1.25 per barrel, and that Morgan had received from Oliver, Finnie & Co. $552.58; that Oliver, Finnie & Co. made, from May 1st, 1869, to April 1st, 1870, 1,213 barrels of flour, which, at $1.25, amount to $1,516.25.

That 200 barrels per month ought to have been made for $11\frac{1}{3}$ months, which would make 2,266 barrels at $1.25, in all $2,832.50, which amount if in the opinion of the court the law is for the plaintiff, we find for the plaintiff, &c. A motion for a new trial being made, the plaintiff entered a remittitur of $120, and thereupon the court overruled the motion and gave judgment for $2,781.17, allowing $1.25 per barrel on the
451 number made by Morgan, viz, 401, and on 2,266, the number that Oliver, Finnie & Co. ought to have made, deducting the payment and the remittitur. Several instructions were asked to be given to the jury on both sides, which were refused, and a special verdict ordered to be found. The most important of the instructions requested by the defendants involved the question, whether the instrument given by the Rumford Chemical Works to Morgan on the 1st of February, 1869, conferred upon him the personal privilege of using the patented process for preparing the self-rising flour which was annulled and revoked by his death, or whether it vested in him an interest which passed upon his death to his personal rep-

resentative. This question must be determined by the intention of the parties as manifested by the instrument itself. The consideration
452 of the instrument given by the Rumford Chemical Works to Morgan is expressed to be the agreement of even date; for that consideration they sell, assign, and transfer to Morgan the exclusive right for five years, to use Horsford's patent for the purpose of manufacturing, using, and selling the self-rising flour. By the express terms of the instrument it is a bargain and sale and transfer of a right in the patent; it is an exclusive right within a specified territory. It is a sale, transfer, and assignment of an exclusive right for a consideration expressed in an agreement entered into at the same time and as part of the transaction; that consideration was that Morgan would immediately commence the manufacture of self-rising flour; that he would use all his skill and business tact in introducing and selling the same during the five years, and that he would
453 purchase all of the acid used in making the self-rising flour from Rumford's Chemical Works. It was to the interest of Rumford's Chemical Works that the self-rising flour should be extensively introduced, as thereby they would reap larger profits by the sale of the acid required in the manufacture. It was therefore a sale, transfer, and assignment of a right to use a patented process, to use it exclusively for a specified time and within a specified territory, and for a specified valuable consideration. It is wholly immaterial that the right sold, transferred, and assigned is denominated a license or that it is not accompanied by the words executors, administrators, or assigns.

The language plainly vests in Morgan a right, and it is not the less a right because it is called a license—it is a license based on a valuable consideration, and not a mere personal privilege. Nor do the Rum-
454 ford Chemical Works reserve the right to revoke the license at pleasure; they can only revoke it if Morgan should fail to perform the stipulations imposed on him. His death within the five years is not embraced as a contingency on which the right is dependent. By the terms of the contract it is a vested right for five years, and upon his death it passed to his personal representative as assets. It is next insisted that the contract between Morgan and Oliver, Finnie & Co., which is sued on, was one that by its own nature was limited in duration to the life-time of Morgan; that is, that it was a contract for the personal services of Morgan in the supervision and management of the business, and hence that his administratrix had no power as such to carry it on, and that it was extinguished and determined by his death. The general rule is well settled that the trade of the deceased dies with him and his personal representatives cannot carry it on. (1 Story Contr., § 287.)

455 But within this rule is not included the performance and completion of any unfinished executory contract made by the testator or intestate, which are not essentially personal, such as a contract to build a house, or publish a book, when the building or publishing is already commenced. (1 Story Con., § 287, and authorities cited.) The only question then to be considered in this case is, was the contract on the part of Morgan with Oliver, Finnie & Co. essentially personal? Morgan owned the right to use the patented process, and the object was to develope its value by using it in the manufacture of the self-rising flour. For this purpose he agrees with Oliver, Finnie & Co. that if they will furnish a

house and the means of buying the wheat and buckwheat flour, and the necessary ingredients, he will superintend the manufacture or have it done and provide the necessary labor or laborers, using his patented pro-
456 cess, for which services and for the use of his patented process Oliver, Finnie & Co. agree to pay him $1.25 for every barrel of flour made down to April 1, 1870. It is obvious that the essential part of this contract is not the personal services of Morgan, but the use of his patented process in the manufacture. Without the use of this the enterprise would be worth nothing, but the superintendence of the work may as well be carried by any other competent person as by Morgan. The contract expressly contemplated that in the absence of Morgan his place is to be supplied by some other superintendent. His object was to benefit the Rumford Chemical Works as well as himself; such was his contract with them, and for this purpose it was necessary for him to travel and extend the use and consumption of the manufactured article. This is provided for in the contract with Oliver, Finnie & Co., and it
457 shows that the personal supervision of Morgan was not the essential element in the contract, but that the manufacture could be as well superintended by another as by him. The case falls, therefore, literally within the rule that an executory contract may be carried on by a personal representative where it was made by the testator or intestate and its execution commenced before his death. In this case we have seen that the right to the use of the patented process for five years belonged to Morgan, and that upon his death this right passed to his administratrix. Her intestate has contracted to use this right until the 1st of April, 1870, in manufacturing self-rising flour for Oliver, Finnie & Co. This was a contract which Morgan's personal representative had the right to carry out, and neither the Rumford Chemical Works nor Oliver, Finnie & Co. had any right to present it.

It is next maintained for defendants that whatever rights Mor-
458 gan acquired by the transfer to him by the Rumford Chemical Works on the 1st of February, 1869, were vested in his assignee in bankruptcy. His petition in bankuptcy was filed on the 30th of May, 1868, and the transfer was made afterwards, on the 1st of February, 1869, and was based on a patent granted in April, 1868. Whatever rights Morgan had by transfer under an older patent may have passed to the assignee or may have been abandoned by him. We see no evidence of any assertion of such claim, nor do we see how such claim could be made in view of the fact that more than two years had elapsed from the application for bankruptcy to the commencement of this suit, and the further fact that plaintiffs' claim rests on a sale and transfer made to Morgan, after the date of the bankrupt petition. Besides, defendants recognized Morgan's right to the patented process by their contract with him, in which
459 they bound themselves not to become his competitor for the rights under the patent either at the bankrupt sale or in any manner whatever, and the claim which they now set up is not only in violation of that contract, but it is wholly inconsistent with the defence that the title is in the assignee in bankruptcy. The only remaining question is as to the correctness of the rule adopted by the court, in fixing the amount of damages upon the special verdict. No special objection is urged here to the refusal of the court to give to the jury the several instructions asked for, and

in simply directing them to find the facts in a special verdict. Objection is made, however, to the finding of the jury as to the number of barrels that ought to have been made from the death of Morgan to the 1st of April, 1870. The jury found that 200 barrels per month ought to have been made for $11\frac{1}{3}$ months, and the court based its judgment on their
460 finding. We are satisfied that as Oliver, Finnie & Co. went on after Morgan's death to manufacture flour under his franchise and with his machinery, it was proper to hold them responsible, not merely for the flour actually manufactured, but for all that ought by ordinary diligence, and in view of the demands for the flour in the market should have been manufactured. We think the evidence fails to show that as much as 200 barrels per month ought to have been made by reasonable diligence, and in view of the demands of the market. On this point we think the court was not sufficiently explicit in instructing the jury as to their duty in ascertaining how many barrels ought to have been made. While the number of barrels actually made did not furnish conclusive evidence as to the number that ought to have been made, yet in the absence of proof showing any failure in their attention to the business, or that they failed
461 to keep pace with the demands of the market, as they were interested in making the largest number, the fair presumption would be that they made all that ought to have been made. In fixing the amount for which plaintiff was entitled to judgment upon the special verdict the court adopted the price agreed upon by the contract.

There was no error in this, as defendants went on to manufacture the flour under the contract with Morgan, and as his administratrix offered to perform and fulfill the contract on the part of her intestate. This question was settled in the case of Jones vs. Jones, 2d Swan, 607. In that case the court said: "The plaintiff does not pretend that he has performed his part of the contract, but alleges as an excuse that the defendant refused to receive performance, and discharged him from service. This is a good excuse, and is taken as equivalent to performance, if the de-
462 fendant was in fault, and had no right, in view of the facts of the case, to discharge the plaintiff from service. If the defendant had no right to rescind the contract it is not in point of fact rescinded, but remains obligatory upon him, though he refused on his part to perform it, or to accept performance. In this view of the case the defendant is liable to the full extent of the wages stipulated in the contract." But it is insisted that as Morgan was bound by the contract to superintend the manufacture in person or to have it done by another, and also to procure all the necessary laborers at his own expense, the court erred in not submitting the question to the jury as to the amount for which defendant was entitled to be credited for superintending the manufacture and procuring the necessary laborers, from the 19th of April, 1869, the date of Morgan's death, down to the 1st of April, 1870, when the contract expired. This ques-
463 tion was fully examined in the case of Jones vs. Jones, already cited. In that case an overseer had been employed for a year at $275. His employer discharged him without cause and refused to receive performance. The overseer sued for the whole amount of his wages for the year and recovered $275. But it appeared in proof that after being discharged he obtained employment and earned wages for the residue of the year. The question was whether the circuit judge ought not to have

instructed the jury that the amount so received or earned should be deducted from the $275. On this point this court set aside the verdict, saying: "The verdict is evidently founded upon the ground that the plaintiff was improperly dismissed, and is for the full amount stipulated in the contract. But as the term, continuance, and circumstances of the second employment were clearly proved, we can see no reason why it was
464 not taken into consideration and the damages reduced by its reasonable value, in the absence of express proof of the amount paid, unless the jury considered themselves restricted by the terms of the charge." Following this authority, we are of opinion that the circuit judge should have submitted to the jury the inquiry as to the reasonable cost incurred by defendants in procuring the performances of the services which Morgan had undertaken to perform himself or have performed from the 1st of May, 1869, to the 1st of April, 1870, with the view of reducing the contract price of the barrels of flour made, or which ought to have been made, as already explained. For the errors indicated the judgment will be reversed and a new trial awarded.

NICHOLSON, *Judge.*

465 THE STATE OF TENNESSEE:

I, John H. Freeman, clerk of the supreme court of said State for the western district thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the judgment, as well as copy of the opinion accompanying same, pronounced by said court at its April term, 1872, in the case of Oliver, Finnie & Co. against Mrs. Kate Morgan, adm'x, &c., as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court at office in Jackson, on this the 13th day of July, 1872, and the Independence of the United States the 97th year.

[L. S.] JNO. H. FREEMAN, *Clerk.*

466 THE STATE OF TENNESSEE:

To the honorable the judge of the first circuit court of Shelby county, holding and presiding at Memphis, State of Tennessee:

Whereas in our supreme court, held in the city of Jackson, for the western district of said State, at its April term, 1872, it was ordered and adjudged in the cause wherein Oliver, Finnie & Co. are plaintiffs in error, and Mrs. Kate Morgan, adm'x of A. F. Morgan, dec'd, defendant in error, brought to our said supreme court by appeal from said circuit court, that the same be remanded thereto for further proceedings and final determination therein; these are, therefore, to require you, the court as aforesaid, that you proceed with the execution of this judgment of our said supreme court (a copy of which is hereunto attached) by such further proceedings in your court as shall effectuate the objects of this order to remand and at-
467 tain the ends of justice in the premises.

Witness John H. Freeman, clerk of our said court, at office in the city of Jackson, the first Monday of April, A. D. 1872, and of American Independence the 96th year.

JNO. H. FREEMAN, *Clerk.*

468 *Agreement as to verdict.—Filed Dec.* 1, '73.

First circuit court.

KATE G. MORGAN, ADM'X,
vs.
OLIVER, FINNIE & CO. } No. 2225.

By consent a verdict is to be taken in the above cause for $800, and in the same entry an acknowledgment is to be made of the satisfaction of the same.

Nov. 28, 1873.

W. G. RAINEY,
Atto. for Pl't'ff.

469 KATE G. MORGAN, ADM'X OF A. F. MORGAN,
vs.
J. N. OLIVER, J. P. FINNIE, AND G. M. WESTON, firm of Oliver, Finnie and Co. } 2225.

Come the parties by their attorneys, and a jury of good and lawful men, to wit: E. Morrow, H. S. King, J. J. Jenny, L. Raja, J. J. Butler, P. S. Simons, J. Graham, G. B. Wra, Geo. R. Redford, T. McMahan, Stephen Dellacella, and R. M. Firth, and being elected, tried, and sworn, well and truly to try the issues joined and true verdict render according to the law and evidence, upon their oath do say they find in favor of the plaintiff and assess her damage at eight hundred dollars.

Therefore it is considered by the court that plaintiff recover of defendant said sum of $800, and that execution issue; and thereupon in open court the plaintiff, by her attorney, W. R. Rainey, acknowledges satisfaction of said judgment.

470 Therefore it is considered by the court that plaintiff recover of defendants the costs herein for which execution will issue.

471 Further proceedings had on, to wit, the 7th day of Feb'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No. 1916.

In this cause came again the parties, by their attorneys, and came also the jury heretofore empanneled, who having listened to the testimony and heard the arguments of counsel, when, there not being sufficient time to conclude the trial of this case to-day, the further hearing thereof is postponed until Monday morning next at ten o'clock.

472 Further proceedings had on, to wit, the 10' day of Feb'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE & WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No. 1916.

The further hearing of this cause is continued until Wednesday morning next at ten o'clock.

473 Further proceedings had on, to wit, the 12' day of Feb'y, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No.

The further hearing of this cause is continued till Monday morning next at ten o'clock.

474 RUMFORD CHEMICAL WORKS, FOR THE use of Payne & wife, as adm'x of A. F. Morgan, dec'd,
v.
OLIVER, FINNIE & CO.

Charge of the court, Feb'y 17, 1879.

GENTLEMEN OF THE JURY: The plaintiff, in behalf of the administratrix of A. F. Morgan, dec'd, sues the defendants for damages for an alleged infringement of a patent by the sale of self-rising flour. The defendants do not deny that from April 1, 1870, to February 1, 1874, which is the time sued for, they did sell flour made by the patented process within the prescribed territory set out in what has been called Morgan's license; and if, notwithstanding the defences they set up, their sales were an infringement of the patent, they are liable for whatever damages we shall adjudge against them. As you have noticed, the issues of law and
475 fact raised by the complicated pleadings are numerous, and the case has been contested inch by inch by learned and able counsel on both sides, who were two weeks in trying it. I know of no better way of presenting to you the opinion of the court on these questions than by taking them up in the order of time as shown by the occurrence of the facts: On the 22d of April, 1856, a patent was granted to E. N. Horsford, known in the record as No. 14722, for an improvement in pulverulent acid for use in the preparation of soda powders, farinaceous food, and other purposes, and on the 9th day of September, 1865, the Rumford Chemical Works, the plaintiff here, made a contract with A. F. Morgan, the intestate of plaintiff, by which he was granted the exclusive privilege of using the patented article for those years in a territory in and adjacent to Memphis, and afterwards other contracts of a like character, to be here-
476 after noticed.

1. It is claimed by the defendants that there is nothing in this

record or the proof to show that Horsford ever assigned this patent to the Rumford Chemical Works. The patent laws require assignments to be recorded in the Patent Office, at Washington. An assignment of a reissue of the patent had been introduced in evidence, and it appears that the final extension was made directly to Horsford and afterwards assigned to Rumford Chemical Works. You may look to the fact that the reissues, one or more of them, and the extension were assigned, made directly to the chemical works, and that they were in possession, as circumstantial evidence to show that the plaintiff did own the original patent, if you find it necessary to go into that question. But I deem it wholly immaterial here whether the plaintiff owned the original patent or not; there is no
477 dispute but that on the 1st day of April, 1870, and on the 1st of February, 1874, the chemical works owned the reissues of the patent and the final extension, by direct grant from the government, and we are authorized to presume that the Patent Office rightfully issued them to this plaintiff. On January 1, 1866, the Rumford Chemical made another contract with Morgan, by which they granted him the same exclusive privilege as before, for five years from that date, making some changes of territory, and perhaps other changes, not material here. This privilege, you will observe, would and did expire by limitation of time, on the 1st day of January, 1871. It is in proof that about January 1st, 1868, Morgan ceased to use the privilege by making and selling the flour, and on May 3d, 1868, filed his petition and was adjudicated a bankrupt, where-
478 upon one Cirode was appointed his assignee in bankruptcy, and received from the bankruptcy court a deed of assignment conveying to him all the property Morgan owned on the 3d day of May, 1868. At that date there were unexpired two years and eight months, less two days, of this second contract with Morgan; and of this time the period of April 1, 1870, to January 1st, 1871—say nine months—is included in the time of the alleged infringement sued for here.

2. As to this nine months, it is claimed by defendants that no recovery can be had, because if it was not under the contract with Morgan a purely personal privilege (of which I shall consider further on), ended by the suspension of business and the bankruptcy, it passed to Cirode, the assignee in bankruptcy, and that he is the only party entitled to sue for the infringement during that nine months. The plaintiffs admit
479 that it was a property which might pass by the bankruptcy assignment at the election of the assignee, but that he elected, as he might, not to take it, and that therefore the property remained in Morgan, notwithstanding the assignment. They further say that by an adjudication of the supreme court of Tennessee this question has been settled between these parties, and they offer the record of that case in evidence, and plead it as an adjudication and estoppel on this point. Now, prior to this period of nine months, to wit, on the 19th April, 1869, Morgan died, and the plaintiff, Mrs. Payne, then his widow, became his administratrix. The effect of his death upon the property Morgan owned in this patent is more important than the effect of the bankruptcy, for if the death ended the property, that is, if it died with Morgan, as is so urgently urged by defendants, his wife,
480 as administratrix, did not take it by operation of the administrative laws any more than Cirode, the assignee, did under the

operation of the bankruptcy laws, and she cannot recover for any of the time sued for here. I shall therefore first consider of the effect of the death, as it covers the whole time sued for, and the bankruptcy only covers nine months, and in the view the defendant takes the effect of either was the same, viz, to end Morgan's interest in the patent. Again, the plaintiff replies to the defendant that it was a property which passed by operation of law to the administratrix, and that the supreme court of Tennessee, is a suit between these parties, has so authoritatively decided, and that it is no longer open to litigation. I think there is no element of personal skill contained in this contract of the chemi-
481 cal works with Morgan, at least not such as brings it within the principle insisted on by defendants. It is not like a contract to write a book or paint a picture; and so far as skill enters into it it is only such as is contemplated in any contract whereby one merchant agrees with another to buy exclusively from him an article of merchandize, and as much of it as he can possibly sell in a given market. But it is said by defendants that whether this be a contract for personal skill or not, it is purely a personal privilege granted to Morgan alone, to use and sell the patented article within a given territory, which by the terms of the grant was confirmed to him, and that he could neither assign the privilege nor could it pass by operation of law to his personal representative nor to his assignee in bankruptcy, because the contract
482 does not contain a grant to him and his assignees nor personal representatives. And they further say that Morgan's own conduct and his correspondence with the chemical works at the time of his bankruptcy and his taking out a new contract after that event, demonstrates that the parties themselves so intended it, and have so continued it for themselves. And they further say that the knowledge of the defendants that Morgan and the chemical works did so regard*ed* it and acted upon it, at the time of the bankruptcy, and that they by reason of that construction made at one time a contract with Morgan under which they operated jointly with him after the bankruptcy, estops Morgan's administratrix from setting up any other construction. There is a principle of law that where the conduct of a party operates to deceive another, he should
483 be estopped to take anything as against the other by reason of the deception, although he may sustain injury by the acts induced by the deception. I think it unnecessary to trouble you with any statements about the law on this subject, for the reason that it has no application to this case, as I understand it. The defendants knew, as the undisputed facts show, that this legal opinion of the chemical works and Morgan, or if the defendants are right, this binding construction of their contract by themselves was repudiated by this administratrix immediately after his death, and long before April 1, 1870, the time when the alleged infringements for which this suit is brought commenced. The conduct or construction of Morgan and the chemical works, based on their own legal opinion as to whether it would pass by operation of law, was not binding on his administratrix by estoppel or otherwise; at least not as to strangers. When these defendants commenced
484 their sale of the self-rising flour on April 1, 1870, in defiance of the rights claimed by Mrs. Morgan, as the truth indisputably shows they did, they assumed whatever peril there was if by law she had

succeeded to her husband's rights in the patent. They suffered no injury by her conduct in the matter, and the law bound them to decide for themselves this question as to whether she was the legal owner of the exclusive privilege. This brings us back, then, to the question whether it was a purely personal privilege, which died with Morgan. A patent is itself in one sense a privilege purely personal; it is a contract of law for the sole benefit of the patentee, and not a matter of common right. It is one of the very highest examples of the exercise by a government of the sovereign right to create a property in privileges. But it is none the less a property.

Our patent laws have, for obvious reasons of utility and value,
485 in aid of the patentee and on grounds of public policy, taken the privilege, although personal in the strict sense, out of the category of non-assignable privileges, and authorized the patentee to do with it, in that regard, just what he could do with any other property. He may sell, assign, and convey in whole or in part. He may authorize another to use his patent or its products, with or without fee or reward, and may make any contract he chooses in relation thereto. Whether a particular contract amounts to an assignment which conveys away the whole of the patentee's property or only a part of it; *whether a particular contract amounts to an assignment which conveys away the whole of the patentee's property or only a part of it;* whether it be a mere personal license, or the conveyance of a distinct part of the patents, depends upon the nature of the contract and very largely upon the character of the
486 patent itself. The act of 1890, sec 36, (Rev. Stat., 4898,) says that "any interest in a patent shall be assignable by law." The patented article with which we are now concerned is a peculiar acid, manufactured in a peculiar manner, and for a particular purpose. The use of that preparation in its application to farinaceous food is also patented. It is manifest, therefore, that the manufacture and sale of the acid powder are entirely distinctive from the preparation and use by sale of the flour with which it has been mixed. The two are readily divisible, and this divisibility may be utilized by the parties in separating and fixing "any interest" which they may desire to separate, and about which they may contract. (17 Wall., at p. 456, top par.) The flour itself, after mixing, is not patented; it is only the process of mixing with flour this particular pulverulent acid which is patented, not the mechanical process,
487 but the chemical process, if I may so describe it, of putting the flour, this acid, and any desirable alkaline carbonate together in the preparation "known as self-rising flour" in this controversy. It is plain, therefore, that the mere retention of the patentee of the exclusive right to manufacture and prepare the powdered acid for such use as Morgan put it to does not militate against the idea of this being an assignment of an exclusive interest in the patent within the particular territory. Taking the instrument executed by the chemical works to Morgan, along with the contract Morgan made with them contemporaneously, as we must, and I think it amounts for the time specified to an exclusive grant, subject to the reservation named, of the right to mix this acid with flour and the other necessary ingredients, and to sell the product within the specified territory. It is such an interest as by the patent law itself was "assignable in law,"
488 and not such a mere license as required the contracting parties to agree that it should be assignable in law or by the party himself. It is true

Morgan agrees, in consideration of the grant, to buy only the acid manufactured by this corporation, the owner of the patent; but that was an independant covenant, for a breach of which they might sue him, and perhaps revoke the grant, and it may be, by the mere breach, the grant would have been defeasible, but it was none the less an assignment because revocable on condition, or defeasible by breach of conditions. The same may be said of the other conditions or requirements of the contract of Morgan relied upon to reduce it to a license. I charge you, therefore, that the property Morgan had in this patent passed to his administratrix, and did not terminate with his death. But the defendants say, if this be true,
the interest he had on the 3d May, 1868, passed by the bankruptcy
489 to Cirode, his assignee, and that plaintiffs cannot recover for nine
months of the alleged infringement. This is undoubtedly true, unless you find from the proof that Cirode, the assignee, abandoned the contract to Morgan. Mere non-claim on the part of Cirode is not enough to effectuate this result. Whenever a person goes into bankruptcy his contracts with other persons which are beneficial pass to the assignee, if the assignee chooses to assume the burden of carrying them out. Here the assignee formed a contract, such as has been given in evidence before you. It had attached to the exclusive interest in the patent certain burdens of performance as the bankrupts part, for the non-performance of which there were rights of revocation and forfeiture such as you find in the contract itself. He could elect to take the interest and perform the contract, or he could refuse performance, leave
the interest with the bankrupt. If he elected to abandon the contract,
490 the title to the interest in the property remained with the bankrupt.
It is for you to say, from the evidence, which he did. If you find that he abandoned the contract to the bankrupt you will disregard the bankruptcy altogether; if you find that he accepted the interest, and merely elected to administer it in bankruptcy, the title to the interest in the patent remains with the assignee, and you will exclude the nine months of infringement covered by it. This view of the effect of the death and bankruptcy makes it unnecessary, perhaps, for me to rule on the questions so much argued, as to the effect of the suit in the State court upon the rights of these parties. But it is not improper for me to say, and to charge you, that in my opinion the decision of the supreme court is not binding, either as an adjudication or as a rule of property which this court must follow. I think
the questions of the effect of the death and bankruptcy were essenti-
491 ally raised in that case, but the suit was not finally determined, the
judgment of the circuit court being reversed and the cause remanded for a new trial. Under such circumstances, I understand the supreme court itself would not have been bound by this decision, as was ruled in Apperson v. Bynum, 9th Heiskell, 644, on a subsequent appeal; and we are not bound, in any view, further than the State court itself was bound. It is a question of general law, arising upon the construction of the contract, and therefore not binding on us as a rule of property. The defendants insist that if the privilege passed to the plaintiff as administratrix, she had no right to carry on the business or trade of her intestate, but that it was her duty to sell the property for creditors and distributees. I think, under the laws of Tennessee governing administration of estates, this is probably true; but these defendants cannot claim as either creditors or distribu-

NOTE.—I am doubtful here; it may be it passed to Cirode absolutely. I reserve the point on motion for new trial, and the jury can take the law as here charged.

492 tees, and they are not in an attitude to complain. They cannot rely upon her breach of duty towards others as a protection to themselves for any infringement of her rights. The patent upon which the plaintiffs claim expired by its own limitation on the 22' of April, 1870, but was extended for seven years. It is now claimed by the defendants that Morgan's right expired with the patent, and he had under his contract no interest in the extension; and if this be so, they say that they are only liable for the alleged infringement for the twenty-one days from April 1, 1870, the beginning of the time sued for, to April 22. It is a question of intention of the parties. It is conceded that if this contract said expressly that the privilege of Morgan should include any right the patentees would acquire by extension, it would carry a right to operate under the exten-
tension. Now, I think the intention that Morgan should have the
493 benefit of the extended patent is as clearly manifested by granting him the right for a time beyond the expiration of the original patent as it would have been by express stipulation. It is a general rule, applicable to all contracts, that whatever is necessarily implied is as binding as that which is expressly agreed. I therefore charge you that by this contract the patentees necessarily conveyed to Morgan the same right for the unexpired time of his contract in the extended patent that he had in the original patent. It appears from the proof that the defendants had from the patentees a license or assignment authorizing them to use the patented article in the same manner that Morgan was authorized to use it, and for the same territory. The defendants' contract with the patentees was subsequent to the plaintiffs', but it covers the whole time
of the alleged infringement. If the contract of the patentees
494 was an assignment to Morgan, this subsequent license or assignment to defendants cannot avail them. If it was only a license, the subsequent license to defendants was a complete protection, and plaintiffs' only remedy would be an action for a breach of covenant against the patentees. No conduct of defendants could change this rule; their own license would protect them from a charge of infringement of the patent, and any right of the plaintiffs growing out of the conduct of defendants in procuring their license would be a matter with which we have no concern in this suit. I have already ruled that the contract with Morgan was an assignment and not a license, as was decided by the supreme court
of Tennessee. And although the case is not binding on the parties
495 as an estoppal or rule of property, I have concluded to follow it, and to rule that Morgan's contract was the assignment of an exclusive right to an interest in the patent, and not a mere license. This brings us to the defence of want of novelty set up by defendants. The issuance of a patent is prima facie evidence of its validity, as to the novelty and utility of the invention. The burden of proof is on the defendants to demonstrate by evidence that the invention is not new. Much proof has been introduced and argument had to show that prior to this patent phosphoric acid had been made into dry pulverulent powder suitable for the purposes to which this patentee has proposed to put it. The article relied by defendants as anti-dating Horsford's acid was what was known
as the three-fourths phosphate of Bezilius described in the Hand-
496 Book of Chemistry, by Leopold Gmelin, volume 3, page 195, published in 1846, and the book has been put in evidence, and testi-

mony adduced before you to identify the two substances as chemical products, which are substantially the same. This issue of a want of novelty has reference solely to the first and second claims of the patent. The first is for the acid as a manufacture; the second for the process by which it is produced, and these, according to the view I take of this case, are not involved in this controversy. Morgan had no right of manufacture of the acid, nor to use the process in its preparation; his right of using it relates entirely to mixing it with flour and selling the product known as self-rising flour. The first and second claims might fail altogether for want of novelty, and this would not affect either the patentee's or Morgan's rights under the
497 third or fourth claims. I charge you therefore to disregard all the proof attacking the patent for want of novelty, so far as it relates to the first and second claims, as irrelevant and immaterial. But it is said by defendants that neither the third or fourth claims are novel, and that they were anticipated by Fowler's patent introduced in evidence before you; and they adduce other proof tending to show that other acids can be used in the same way and with same result. It is your province to compare these claims with the claims of the Fowler patent, and to interpret each by the specifications of the respective patents, and, in the light of all other evidence on these points, to say whether the two patents are substantially the same, or whether any other process of producing self-
498 rising flour given in evidence are the same and existed prior to this patent. If you find that the invention or discovery was not new, it is a good defence to this action; otherwise it is not. It will not do to test this question by the mere comparison of results in the single respect of liberating carbonic acid for the purpose of making the bread light and porous. Prof. Horsford was familiar with the chemical effect of putting an acid and an alkali together in dough, and with the methods in use when he obtained his original patent. He knew of yeast or leaven, of cream of tartar, salaratus, and tartaric acid, and his claim is that he has applied to the same uses another acid which is superior to the others, and which, while it produces the necessary porosity or lightness, increases the healthfulness of the bread, or makes it otherwise more desirable than any previously known substance applied to that use. Prima facie by the
499 very patent itself he has proved that this acid as applied to this use is a novelty. The defendants by their proof must overcome this presumption, and unless you find that prior to his patent other persons used phosphoric acid for this purpose, or some other acid possessing all the same qualities which he specifies his acid to contain, and producing the same results in all substantial respects, you must find for the plaintiff on this question. And you must look to the qualities of his process as affecting not only the bread as a product, but the flour likewise, from the moment of mixing to the moment of consumption; and this as to its trade or commercial qualities, as well as its qualities as food. The third claim is for mixing the acid with flour, thereby forming a marketable commodity, leaving all the preliminary steps towards bread-making completed,
500 except the addition of water and heat in baking. The fourth is for the use of the combined materials in the making of bread. If you find the third claim invalid for want of novelty, you must test the question as to the fourth and not find for the defendants unless you find both claims invalid for want of novelty, and will find for the plaintiffs on

this issue, if you find either claim to be novel or new. For I do not hold the law, as argued by defendants' counsel, that the fourth claim can only be infringed by the baker. I charge you as a matter of law that the fourth claim can be infringed by the mixing and sale of the flour as well as by the baking. So far as this claim is concerned, the baker does not infringe by the addition of water and heat, and those additions are all that distinguish him as a baker from the merchant who mixes the flour and
501 prepares it for the baker. The all essential process is the mixing the ingredients as described, and whoever does that is an infringer, if either of these claims is valid. We now come to the measure of damages, assuming that you have found the issues above mentioned for the plaintiffs. As I understand the law of this subject, it is this: In estimating the actual damages for the foregoing rulings you may look to the testimony tending to show the cost to Morgan of preparing the flour per barrel, the price at which he sold it per barrel, and the profit he made. Enjoying the exclusive right to sell, it was one of his most valuable privileges to fix the price to suit himself and so regulate his own profits. It was incumbent on the defendants to so conduct their business as to expenses and prices of the product of the patent that their profits should not fall short of these the plaintiffs would have made if they had en-
502 joyed their exclusive right to mix and sell the very flour sold by the defendants at the time and under the circumstances which surrounded the defendants in their acts of infringement. And this is what is meant by saying that the defendants are not only liable for the gains they actually made, but also such as they should have made by proper diligence in and about the business. If, therefore, you find that Morgan or the plaintiffs had established a fixed price per barrel as the difference between the crude flour and the prepared article, which he always or generally demanded, you will be authorized to ascertain the profit to him by deducting the cost of preparation; and if you find that the defendants have by their operations made less than the profit Morgan would have made, you will be authorized to find against them the full profit Morgan's administra-
503 trix would have realized if she had carried on the business herself; but if you find defendants made more profits they are liable for all they actually made. But there must be no guess-work or speculation on the subject. Your object is to find out the actual damages done by the sales of the flour, not any damages arising from anything else. The case is with you. If you find for the plaintiffs the form of your verdict will be, "We, the jury, find for the plaintiffs and fix the actual damages at dollars." If for the defendants the form will be, "We, the jury, find for the defendants."

If you find that there has been an infringement, but no actual damages to the plaintiffs, the damages are nominal, and your verdict should be, "We, the jury, find for the plaintiffs nominal damages at" (fixing some small sum).

504 The burden of proof is on the defendants to show that Horsford's patented process to make self-rising flour was not novel, or that it was anticipated by an older patent, if they rely on those defenses.

505 On this branch of the case, the fact that the patent was granted and reissued, and again reissued, is prima facie proof that Horsford was the first and original inventor of the process claimed; and this pre-

sumption is strengthened by the fact that the patent was extended. As to the Fowler patent, the presumption is that it does not conflict with Horsford's, and that both are good patents for different discoveries. The simple fact that each process has for its object the making of self-rising flour does not make them the same. If Horsford's process was an independent one, which made the flour more rapidly than Fowler, that is a circumstance to show that it is a different invention, for one of the elements of novelty in a patent is the saving of cost and time in production. So also, if Horsford's, in his compound, used ingredients which, after making the flour self-rising, left in it beneficial, health-giving properties which were not imparted to it by the ingredients used by Fowler, that would
506 show that it was a new invention, for another test of the novelty of article is that it makes a benefit in what it does in use. These are circumstances you may look to strengthen the presumption arising from the grant, reissues, and extension of the patent, and if the defendants fail to overthrow these presumptions, you will find for the validity of the patent.

Even if you find that Morgan, by his conduct, words, or acts led defendants to think that his license and contract with the Rumford Chemical Works expired with his life, yet if his personal representatives, after his death, and before defendants acquired their license, informed defendants that they intended to claim Morgan's rights that would do away with the effect of Morgan's contract and they would be estopped from claim-
507 ing Morgan's rights under his contract with the Rumford Chemical Works. If you find that the terms and subject-matter of the license and contract between the Rumford Chemical Works and Morgan, cannot be satisfied unless they apply to the extended as well as the original patent and its reissues, and you further find that the Rumford Chemical Works afterwards obtained the extended patent, then the rights under the extended patent would immediately accrue to Morgan so far as was necessary to support and carry out his license and contract.

The defendants are not entitled to any deductions for their own services.

If you take what defendants made as the basis of your verdict, then if you find that defendants did not reduce their expenses in proportion to the falling off of the business you may look to that as evidence that they managed the business improvidently, and that in a
508 proper and provident management of the business more profits would have been made than defendants made out of the business, and in your estimate you may make the proper reduction of the expenses of manufacturing the flour.

If the plaintiffs are entitled to recover at all, they are entitled to recover only the actual damages they have proved that they sustained, and the jury cannot allow any punitive or exemplary damages. The damages are to be ascertained by the jury by calculation from certain data, and the burden of proving the damages is upon the plaintiffs and cannot be found by the jury upon conjecture or guess-work. The plaintiffs are entitled to recover:

1. The profits actually made by the defendants by the infringe-
509 of the patent, not what they might have made by great diligence,

or more extensive infringement. The profits can only be estimated upon the flour actually prepared, and sold by the defendants, and not by what they might have prepared by a further infringement of the patent, and they are to be arrived at by deducting from the gross profit all the elements of the cost of production.

2. Such other damages, if any, as the plaintiffs may have sustained in their business by reason of the infringement. Where the owner of the patent-right does not make use of it himself, or carry on, or attempt to carry on, the business covered by the patent, he cannot recover any damages for an infringement beyond the profits made by the infringer.

510 Nor can there be any recovery for damages to the property itself, which, being incorporeal and intangible, is not capable of receiving

511 physical injury. The jury are instructed that if there has been an infringement by defendants in this case of the rights under the patent, then the inquiry is only as to the actual damages occasioned by such infringement, and during the period of alleged infringement laid in the declaration, and they are instructed that none of the evidence offered in the case as to any of the transactions between the parties, or between the defendants and Morgan, or as to the conduct of either of the parties toward the other, is competent or proper for the jury to consider, nor should any of the arguments of counsel touching the said matters be at all considered by the jury, but all such evidence and arguments should be wholly excluded by the jury from their consideration. Such evidence and arguments have been admitted only to guide the court in the matter of

512 doubling or trebling the actual damages found by the jury, as authorized by statute.

513 *Instructions asked by def'ts.*

RUMFORD CHEMICAL WORKS, USE, &C.,
v.
OLIVER, FINNIE & CO.

1. That the instrument dated February 1, 1869, from the Rumford Chemical Works to Allen F. Morgan, only conferred upon Morgan the personal privilege of using the patented article in the preparation and sale of self-rising flour, and that such privilege terminated on the death of Morgan, and did not pass to his administratrix, and if the jury believe from the evidence that said Morgan died on the 19th of April, 1869, they should find for the defendants.

Which instruction being refused by the court, the defendants then asked the next two charges, to wit:

2. If the jury believe from the evidence that the Rumford Chemical Works on the 1st day of January, 1866, granted to Allen F. Morgan a license precisely like the license dated February 1, 1869, to use the

514 same patented invention for the period of five years from the said 1st of January, 1866, ending on the 1st day of January, 1870, and that said Morgan, on the 30th day of May, 1868, filed his petition in bankruptcy in the proper court, and inserted in his schedule of assets the said license to use the said patented invention, and that he was duly adjudged a bankrupt, and an assignee appointed and an assignment executed to him of the property of the bankrupt, as required by the bankrupt laws, then

all the right which the said Morgan had at the time of his said bankruptcy passed to his assignee in bankruptcy, who thereby became the owner of the term of the said license unexpired and yet to run, on and after the said 30th day of May, 1868, and that the license subsequently granted to said Morgan on the 1st of February, 1869, did not operate to in-
515 vest the said Morgan with the right to use the said patented invention during any part of the term covered by the said previous license of January 1, 1866, whether the same extended to the 1st of January, 1871, or terminated at the expiration of the original patent on the 22d of April, 1870, and the plaintiffs are not entitled to recover in this action for any infringement of said patent during any part of the period covered by said first license of January 1, 1866.

3. The jury are instructed that the original patent, and the two reissues thereof to the Rumford Chemical Works, as assignees of E. N. Horsford, which were given in evidence by the plaintiffs, expired on the 22d Apr., 1870; that the term of the extension for seven years granted to said Horsford would not pass to the Rumford Chemical Works by virtue of any assignment of the original patent, unless such assignment contained
516 language shewing an intention to pass such extension to said company, and that no such assignment has been given in evidence by the plaintiffs. But the plaintiffs have given in evidence an assignment of the said extension by said Horsford to said Rumford Chemical Works, dated May 21, 1870, and the jury are further instructed that the interest which the said Rumford Chemical Works acquired in the said extension of the said patent by the assignment thereof by the said Horsford, on the said 21st May, 1870, did not, nor did any part of the term thereof pass to the said Morgan or to his representatives or assignee, or enure to his or their benefit or advantage, under or by virtue of the said license granted to said Morgan by the said Rumford Chemical Works, bearing date the said 1st of
517 February, 1869, but the right and interest of said Morgan, his representatives and assigns, ceased and determined on the 22nd April, 1870, when the original patent expired.

518 4. In this case the right to the patent only vested in the plaintiffs as administrators of Morgan, if at all, and it is only for the damages sustained by them in that capacity that they can recover.

Plaintiffs, as administrators of Morgan, had no right to carry on the business of preparing self-rising flour, either for the benefit of the estate or of themselves individually. Their duty under the law, as the term was running out, and becoming constantly of less and less value, was to sell the right, and disburse the proceeds to the creditors and distributees of Morgan. There can therefore be no recovery in this action of any damages to the business of the plaintiffs, as administrators of Morgan, for any part of the time between the 1st of April, 1870, and the 1st of February, 1874, which is the period covered by this suit.

All which four instructions were refused by the court, to which refusal the defendants then and there excepted.

519 Defendants also requested the court to instruct the jury as follows:

1. The license to Morgan, granted in February, 1869, under which plaintiffs claim, was in law the grant to Morgan of a personal privilege

only, which died with him in April, 1869, and the jury will render a virdict in favor of the defendants.

Or in lieu thereof, as follows:

2. The plaintiffs claiming as mere licensees have no right to prosecute a suit for infringement of the patent, and the jury will return a verdict in favor of defendants.

Or in lieu thereof, as follows:

3. The license to Morgan, granted in February, 1869, under which plaintiffs claim, was of no force or effect after the expiration of the term of the original patent in April, 1870, and the jury will render a verdict in favor of defendants.

Should all the foregoing requests be declined, then in lieu of No.
520 1, the court is requested to instruct the jury as follows:

4. If the jury find from the evidence that all the alleged acts of infringement committed by defendants between May 1, 1870, and February 1, 1874, were done by them under the license granted to them by the Rumford Chemical Works in May, 1869, and were sanctioned by the said R. C. Works, then they are not liable to a suit for infringement, and the jury will return a verdict for defendants.

And also, as follows:

5. If the jury find from the evidence that the invention of Prof. Horsford, described in the letters patent sued on, in the 1st and 2d claims thereof, was in substance the same as that invented by Berzelius and described in Gmelin's Hand Book of Chemistry, published in 1846, at page 195, and further, that the invention described in the 3d claim of said patent, to wit, the mixing process, was substantially the same as that patented by
521 Fowler in 1845, as pleaded, the acid in Fowler's patent performing substantially the same chemical office and accomplishing substantially the same result as the acid in Horsford's patant, they are instructed that in law the one acid was an equivalent for the other, and that there was no patentable novelty in Horsford's invention, and in such case they will find for defendants.

7. If the jury find from the evidence that at the date of Horsford's patent, there were other acids then well known to chemists, druggists, or merchants, that were in well known and common use for the purpose of being combined with alkaline carbonates, both to be mixed in a dry state in flour, and also to be used in the place of ferment or leaven in raising and making bread, and by the use of which other acids the desired results could be substantially as well secured as by the use of Horsford's acids, then
522 there was nothing so far new in Horsford's invention or process as to make the same patentable, but both the 3d and 4th claims of his patent are void for want of novelty, and the jury will find for defendants.

And should all the foregoing requests be declined, then the court is requested to instruct as follows:

8. If the jury find for plaintiffs on the fact of the assignment, they will render a verdict for only the actual damages, to be ascertained by calculating the profits actually made by defendants during the period of the alleged infringement, by the use of the patented acid, over and above what they could or might have made by the use during the same period of any other acid which they might have used in the preparation of self-rising flour in the same manner, and the difference in profits between the use of the

patented acid and other acid that might have been used will be the measure of damages, and if the jury find from the evidence that defend-
523 ants by the use of the patented acid made no profits, they will return a verdict in favor of the defendants.

All which instructions the court refused to give, to which the defendants then and there excepted.

524 Defendants objected to the following portions of the charge as given, and then & there excepted thereto, to wit:

1. To so much of said charge as says (p. 4): "I deem it wholly immaterial here whether the plaintiff owned the original patent or not. There is no dispute but that on 1st of April, 1870, and on the 1st of February, 1874, the chemical works owned the reissues of the patent and the final extention by direct grant from the government, and we are authorized to presume that the Patent Office rightfully issued them to this plaintiff."

2. To so much of the charge as says (p. 3): "On the 9th of September, 1865, the Rumford Chemical Works, the plaintiff here, made a contract with A. F. Morgan, the intestate of plaintiff, by which
525 he was granted the exclusive privilege of using the patented article for three years in the territory named;" and again, (p. 4): "On January 1, 1866, the Rumford Chemical Works made another contract with Morgan by which they granted him the same exclusive privilege as before for five years."

3. To so such of said charge as in reference to the effect as an estoppal of the conduct and correspondence of Morgan as proved in evidence, says (p. 10): "I think it unnecessary to trouble you with any statements about the law on this subject for the reason that it has no application to this case as I understand it. The defendants knew, as the undisputed facts show, that this legal opinion of the chemical works and Morgan, or, if the defendants are right, this binding construction of their contract by
526 themselves, was repudiated by his administratrix immediately after his death, and long before April 1, 1870, the time when the alleged infringement for which this suit is brought commenced. The conduct or construction of Morgan and the chemical works, based on their own legal opinion as to whether it would pass by operation of law was not binding on his administratrix by estopel or otherwise, at least not as to strangers."

4. To so much of said charge as in discussing the question whether the instrument, under which Morgan claimed were "assignments" or "mere personal licenses," instructs the jury as follows (p. 14):

"It is plain, therefore, that the mere intention by the patentee of the exclusive right to manufacture and prepare the powdered acid for such use as Morgan put it to, does not militate against the idea
527 of this being an assignment of an exclusive interest in the patent within the particular territory. Taking the instrument executed by the chemical works to Morgan along with the contract Morgan made with them contemporaneously, as we must, and I think it amounts for the time specified to an exclusive grant, subject to the reservation named, of the right to mix this acid with flour and the other necessary ingredients, and to sell the product within the specified territory, it is such an interest as by the patent law itself was 'assignable in law' and not such a mere license as required the contracting parties to agree that it should be assignable in law or by the party himself."

5. To so much of said charge as says (p. 16): "I charge you, therefore, that the property Morgan had in this patent passed to his adm'x, and did not terminate with his death."

6. To so much of said charge as says (p. 16): "But defendants say if this be true the interest he (Morgan) had on the 3' May, 1868,
528 passed, by the bankruptcy, to Cirode, his assignee, and that plaintiff cannot recover for nine months of the alleged infringement. This is undoubtedly true, unless you find from the proof that Cirode, the assignee, abandoned the contract to Morgan; mere non-action on the part of Cirode is not enough to effectuate this result. Whenever a person goes into bankruptcy his contracts with other persons, which are beneficial, pass to the assignee, if the assignee chooses to assume the burden of carrying them out. Here the assignee found a contract such as has been given in evidence before you. It had attached to the exclusive interest in the patent certain burdens of performance on the bankrupt's part, for the non-performance of which there were rights of revocation and forfeiture such as you find in the contract itself. He could elect to take the interest and perform the contract, or he could refuse performance and leave the interest with the bankrupt. If he elected to abandon the
529 contract the title to the interest in the property remained with the bankrupt. It is for you to say, from the evidence, which he did."

7. To so much of said charge as says (p. 19): "The defendants insist that if the privilege passed to the plaintiff, as administratrix, she had no right to carry on the business or trade of her intestate, but that it was her duty to sell the property for creditors and distributees. I think, under the law of Tennessee governing administration of estates, this is probably true; but these defendants cannot claim as either creditors or distributees, and they are not in an attitude to complain. They cannot rely upon her breach of duty towards others as a protection to themselves for any infringement of her rights."

8. To so much of the said charge as says in reference to the question whether the extension of the patent passed to Morgan by the licenses under which plaintiffs claim (p. 22): "I therefore charge you that
530 by this contract the patentees necessarily conveyed to Morgan the same right for the unexpired time of his contract in the extended patent that he had in the original patent."

9. To so much of said charge as, after saying that if Morgan had only a license and not an assignment, then the subsequent license to the defendants would be a complete protection to them in this action for infringement, says (p. 23–4): "I have already ruled that the contract with Morgan was an assignment, and not a license, as was decided by the supreme court of Tennessee; and although the case is not binding on the parties as an estoppel, I have concluded to follow it, and to rule that Morgan's contract was the assignment of an exclusive right to an interest in the patent, and not a mere license."

10. To so much of said charge as says (p. 26), "I charge you,
531 therefore, to disregard all the proof attacking the patent for want of novelty, so far as it relates to the first and second claims, as irrelevant and immaterial."

11. To so much of the charge as says (p. 30), "I charge you as matter of law that the 4th claim may be infringed by the mixing and sale of the flour as well as by the baking," &c.

12. To so much of the charge as says (p. 35): "In estimating the actual damages by the foregoing rules, you may look to the testimony tending to shew the cost to Morgan of preparing the flour per barrel, the price at which he sold it per barrel, and the profit he made."

13. To so much of the charge as says (p. 36): "If, therefore, you find that Morgan or the plaintiffs had established a fixed price per barrel as the *as the* difference between the crude flour and the prepared article, which he always, or generally demanded, you will be authorized to ascertain
532 the profit to him, by deducting the cost of preparation; and if you find that the defendants have by their operations made less than the profit Morgan would have made, you will be authorized to find against them the full profit Morgan's administratrix would have realized if she had carried on the business herself."

14. To so much of said charge as says: "Even if you find that Morgan, by his words or acts, led defendants to think that his license and contract with the Rumford Chemical Works expired with his life, yet if his personal representatives, after his death and before defendants acquired their license, informed defendants that they intended to claim Morgan's rights, that would do away with the effect of Morgan's conduct, and they would not be estopped from claiming Morgan's rights under his contract with the Rumford Chemical Works."

533 15. To so much of said charge as says, "If you find that the terms and subject-matter of the license and contract between the Rumford Chemical Works and Morgan cannot be satisfied unless they apply to the extended as well as the original patent and its reissues, and you further find that the Rumford Chemical Works afterwards obtained the extended patent, then the rights under the extended patent would immediately accrue to Morgan so far as was necessary to support and carry out his license and contract.

534 The defendants tender this their bill of exceptions, which is signed, sealed, and made a part of the record.

E. S. HAMMOND. [SEAL.]

MAY 22d, 1879.

(Endorsed:) No. 1916. Rumford Chemical Works, use of J. N. Payne and wife, v. Oliver, Finnie, and Co. Bill of exceptions. Filed May 22d, 1879. Bell W. Etheridge, clerk.

535 Further proceedings had on, to wit, the M'ch day of 15, A. D. 1879, in the following cause, to wit:

RUMFORD CHEMICAL WORKS, USE OF J. N. Payne and wife, plaintiffs,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No. 1916.

In this cause came the parties, by their attorneys, and came also the jury heretofore empanneled, who having listened to the charge of the court relative to the law of this cause, and having retired to consider of their verdict, came into court and say the find the issue in favor of the plaintiffs, and assess their damages at four thousand five hundred and thirty-eight and $\frac{97}{100}$ ($4,538.97) dollars. It is therefore considered by the court that the

536 plaintiffs herein do have and recover of and from the defendants, Oliver, Finnie & Company, the amount of said verdict, to wit, the sum of ($4,538.97) four thousand five hundred and thirty-eight $\frac{97}{100}$ dollars and the costs of the suit, for which let execution issue.

537 Further proceedings had on, to wit, the 17, day of M'ch, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFFS
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No. 1916.

The further hearing of this cause is continued till to-morrow morning at ten o'clock.

538 Further proceedings had on, to wit, the 17' day M'ch, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFF,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

At a former day of this term, and on the day after the rendition of the verdict, the jurors through one of their number, applied to the judge presiding at the trial, to know if they could correct a clerical error in their verdict, and thereupon exhibited to said judge a memorandum of their calculations, and explained that in substracting one amount from another, they had failed to carry forward the figure one, whereby they had
539 made a mistake against the defendants of one thousand dollars, and brought in a verdict against them for $4,538.97, when in fact they intended it to be only $3,538.97. The court informed the respective counsel of this mistake, and the application of the jury to correct it; and now, on motion for a new trial' the defendants offer to prove by one of said jurors the fact of said error, whereupon the plaintiffs admit the error, and offer to enter a remittitur of one thousand dollars, or to have the entry of the verdict show that it was rendered for $3,538.97, and not $4,538.97 as now appears of record, as the court may direct. It is therefore considered by the court that the remittitur of the plaintiffs as aforesaid of one thousand dollars in the verdict be, and the same is hereby, entered, and that the judgment stand only for the said sum of three thousand five hundred and thirty-eight and $\frac{97}{100}$ dollars.

540 Further proceedings had on, to wit, the 18' day of M'ch, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No. 1916.

The further hearing of this cause is continued till to-morrow morning at ten o'clock.

541 Further proceedings had on, to wit, the 19' day of M'ch, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No. 1916.

The further hearing of this cause is continued till to-morrow morning at ten o'clock.

542 Further proceedings had on, to wit, the 20' day of M'ch, A. D. 1879, in the following cause, to wit:

J. N. PAYNE AND WIFE, PLAINTIFFS,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No. 1916.

This cause came on for further hearing, and argument having been heard thereon the case was submitted to the court.

543 Further proceedings had on, to wit, the 19' day of May, A. D. 1879, in the following cause, to wit:

RUMFORD CHEMICAL WORKS, USE OF J. N. Payne and wife, plaintiffs,
vs.
OLIVER, FINNIE & CO., DEFENDANTS. } No.

After the jury was sworn plaintiffs offered to proceed to trial on the original as well as amended declarations and issues on the same. The defendants objected to going to trial on the original declaration upon the ground that they supposed it had been abandoned and it would work a surprise on them if the case was tried on any but the amended declaration filed 21st day of January, 1878. The court upon this state-
544 ment of defendants ruled that the plaintiffs must either go to trial upon the amended declaration alone, and the issues and pleadings under it, or the case would be continued. The plaintiffs excepted to the ruling, *and* but rather than have a continuance went to trial on said amended declaration and pleadings under it, and it appearing to the court that this order was not entered on the day it was made, to wit, the 22d day of January, 1879, it is ordered that this order be entered nunc pro tunc.

545 Further proceedings had on, to wit, the 22' day of May, A. D. 1879, in the following cause, to wit.

RUMFORD CHEMICAL WORKS, USE OF J. N. Payne and wife, plaintiff,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

The defendants moved the court to grant them a new trial, which is

overruled; to which action of the court the defendants except. The defendants tender their bill of exceptions, which being signed and sealed by the court, is ordered to be made a part of the record.

546 Further proceedings had on, to wit, the 23' day of May, A. D. 1879, in the following cause, to wit:

RUMFORD CHEMICAL WORKS, FOR USE OF J. N. Payne & wife, adm'x, plaintiff,
vs.
OLIVER, FINNIE AND CO., DEFENDANT. } No. 1916.

This day came the defendants and tendered their supersedeas bond in the penalty of seven thousand one hundred dollars, conditioned as required by law for a supersedeas bond with N. M. Jones as surety, and it being admitted by plaintiff's counsel, in open court, that said Jones is solvent and a good surety, and the court being satisfied therewith, it is ordered that said bond be accepted as a good and sufficient supersedeas bond
547 on the writ of error prosecuted by said Oliver, Finnie & Co., from the judgment in this cause.

548 Supreme Court of the United States.

Know all men by these presents, that we, Oliver, Finnie & Co., as principals, and N. M. Jones, as surety, are held and firmly bound unto the Rumford Chemical Works, for the use of J. N. Payne and wife, Kate G. Payne, in the sum of seven thousand one hundred dollars, to be paid to the said Rumford Chemical Works, for use of J. N. Payne & wife, executors or administrators, to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 23d day of May, 1879.

Whereas the above-named Oliver, Finnie & Co. hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named Oliver, Finnie & Co. shall prosecute their said writ of error to effect, and answer all costs, debt, and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

OLIVER, FINNIE & CO., [SEAL.]
By H. F. DIX, *Att'y.* [SEAL.]
N. M. JONES. [SEAL.]

Acknowledged before me this 22d day of May, 1879.
BELL W. ETHERIDGE, *Clerk.*

549 (Endorsed:) No. 1916. Circuit court of the United States, western district of Tennessee. The Rumford Chemical Works, for use of J. N. Payne & wife, vs. Oliver, Finnie & Co. Writ of error bond to United States Supreme Court. Filed the 23' day of May, A. D. 1879. Bell W. Etheridge, clerk.

Bond approved and accepted as good and sufficient as a supersedeas bond.

This May 23, 1879.

E. S. HAMMOND, *Judge.*

550 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the western district of Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you, between the Rumford Chemical Works, for the use of J. N. Payne and wife, Kate G. Payne, plaintiff, and Oliver, Finnie & Co., defendants, a manifest error hath happened, to the great damage of the said Oliver, Finnie & Co., as by their complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1879, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 22' day of May, A. D. 1879, and 103' of American Independence.

[L. S.] BELL W. ETHERIDGE, *Clerk.*

, *D. C.*

(Indorsed:) No. . Circuit court of the United States, western district of Tennessee. vs. . Writ of error. Issued the day of , A. D. 187 . H. E. Andrews, clerk. , d. c.

551 (Endorsed:) No. 1916. Circuit court of the United States, western district of Tennessee. The Rumford Chemical Works, use of J. N. Payne & wife, vs. Oliver, Finnie & Co. Writ of error. Issued the 23' day of May, A. D. 1879. Bell W. Etheridge, clerk.

552 UNITED STATES OF AMERICA:

To the Rumford Chemical Works, for the use of J. N. Payne & wife, Kate G. Payne, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October, 187 , pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the circuit and western district of Tennessee, wherein Oliver, Finnie & Co. are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the honorable E. S. Hammond, judge of the district court of

the United States for the western district of Tennessee, this 23' day of May, 1879.

E. S. HAMMOND, *Judge.*

553 (Endorsed:) No. 1916. Circuit court of the United States, western district of Tennessee. The Rumford Chemical Works, for use of J. N. Payne & wife, vs. Oliver, Finnie & Co. Citation. Filed the 23d day of May, A. D. 1879. Bell W. Etheridge, clerk.

554 THE UNITED STATES OF AMERICA:

Sixth circuit and district of West Tennessee.

I, Bell W. Etheridge, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the original record and proceedings in said court as the same now appears of record and upon the files in my office, in the following cause, to wit: Rumford Chemical Works, use of, &c., vs. Oliver, Finnie and Co. # 1916.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 31st day of March, A. D. 1880, and of the Independence of the United States the 104th year.

[SEAL.] BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

(Indorsement on cover:) No. 211. Oliver, Finnie & Co., plaintiffs in error, vs. The Rumford Chemical Works, for the use of J. N. Payne & wife, Kate G. Payne. W. Tennessee C. C. U. S. Filed 12th April, 1880.

ADDITION TO RECORD 211.

OLIVER, FINNIE & COMPANY, PLAINTIFFS IN error,
vs.
THE RUMFORD CHEMICAL WORKS, FOR THE USE of J. N. Payne et ux.
No. 211.

Stipulation of counsel and addition to record.—Filed November 4, 1882.

1 Supreme Court of the United States.

OLIVER, FINNIE & Co., PL'T'FFS IN ERROR,
vs.
RUMFORD CHEMICAL WORKS, USE OF PAYNE & wife, adm'rs, def'ts in error.
No. 211.

Error to the circuit court for the western district of Tennessee.

The exhibits M, B, F, & G, to the deposition of John R. Maurice, contained on page 94 and subsequent pages of the printed record in the above cause, having been omitted in copying the same, it is agreed by counsel of both parties that the certified copies of said exhibits, annexed hereto, may be filed in the Supreme Court, and made part of the record in the same manner and with like effect as if the same had been brought up, on suggestion of diminution, by writ of certiorari.

October 25, 1882.

ESTES & ELLETT,
Counsel for Pl't'ffs in error.
HARRIS McKISICH & PERLEY,
For Def'dts in Error.

2 Circuit court of the United States, western district of Tennessee.

RUMFORD CHEMICAL WORKS, USE OF PAYNE and wife, a'm'rs, &c.,
v.
OLIVER, FINNIE AND CO.

Exhibit M to the deposition of John R. Maurice, taken November 23*d*, 1871, *in the above cause.*

EXHIBIT M.

Copy form of license issued to Allen F. Morgan, and also to Oliver, Finnie & Co.

To all people to whom these presents shall come, The Rumford Chemical Works, a corporation transacting business in East Providence, in the State of Rhode Island, sends greeting:

Know ye that the said corporation in consideration of the agreement of

even date herewith entered into by and between it and of , in the county , and State of , does hereby sell, assign, and transfer unto the said , the right to
3 use within the territory described in the said agreement, Horsford's patent cream of tartar substitute for the purpose of manufacturing within said territory self-raising cereal flours, with the right to use and sell the flours so manufactured; to have and hold and exercise such right within the limits aforesaid, for and during the time and under and subject to the conditions and limitations named and specified in the agreements aforesaid, of even date herewith, to which reference is hereby made as a part hereof.

In testimony whereof the said corporation have caused these presents to be signed and its corporate seal to be herewith affixed on this day of , A. D. eighteen hundred and sixty- , by its treasurer and agent, for this purpose duly authorized.

GEO. F. WILSON,
Treasurer.

Signed, sealed, and delivered in presence of—

4 EXHIBIT B.

Filed with me as part of witness' deposition as the paper referred to by him in said deposition as Exhibit B, G. W. C.

To all men to whom these presents shall come:

Know ye that because the Rumford Chemical Works, a corporation located at and doing business in the town of East Providence, in the State of Rhode Island, has granted unto Allen F. Morgan, of the city of Memphis, county of Shelby, and State of Tennessee, the exclusive right to manufacture, sell, and use, during the time of five years from the date hereof, the article known as self-raising flour from cereals by the use of Horsford's patent pulverulent phosphoric acid in the following-described territory, to wit, beginning at a point where the northern boundary of the State of Tennessee touches the Mississippi River, thence southerly
5 along the said river to and including Vicksburgh; thence easterly along line of the Mississippi Southern R. R. to Jackson; thence northerly along the line of the Mississippi Central R. R. to Grenada; thence northeasterly to the junction of the eastern boundary line of Alabama with the southern boundary line of Tennessee, thence along the eastern boundary line of Middle Tennessee (so called) to the northern boundary line of Tennessee, and thence westerly along said boundary line to the point of beginning, by an instrument in writing bearing even date herewith, which is made a part of this agreement, and because of other good and sufficient reasons moving him thereto, has agreed, and by these presents does covenant and agree to and with the aforesaid Rumford Chemical Works, that he will manufacture self-raising flour in accordance with the written instructions furnished by the said Rumford Chemical Works, as to proportions and quality of flour, and that he will use all his business
6 tact and skill and all other means necessary to introduce and sell the same, and to make the sale thereof as large as is in any way possible in the territory aforesaid during the continuance of the license

aforesaid, and no longer, and to sell the said self-raising flour nowhere but in the territory specified, excepting upon the written consent of the said Rumford Chemical Works.

And I further agree to accept in the aforesaid license such rights as are covered by the patents granted to Eben N. Horseford, and by him assigned to the said Rumford Chemical Works, and to maintain them at my own cost and expense in suits at law whenever it shall be in my judgment necessary so to do, and to avail myself of such advice, counsel, and assistance as the said Rumford Chemical Works may elect to give in said suits.

The use of said phosphoric acid by families, for domestic pur-
7 poses, shall not be construed as a violation of this agreement.

In testimony whereof the parties hereto have hereunto affixed hand and seal this first day of January, A. D. 1866.

ALLEN F. MORGAN. [SEAL.]

Signed, sealed, and delivered in presence of—
Witness: SAM'L L. MAY.

8 EXHIBIT F.

MEMPHIS, TENN., 27*th Jan'y*, 1869.

JOHN DWIGHT & CO., *New York City:*

DEAR SIRS: A very decided change has to-day taken place in the house of Finnie & Buckham. The firm is now Oliver, Finnie & Co.; Mr. Buckham retiring from the house, and Mr. J. N. Oliver, late of the firm of J. N. Oliver & Co. (this city), and Mr. W. M. Western, late of Cincinnati, Ohio, coming in. Mr. Finnie you have seen; he was the man in the old firm. Mr. Oliver is probably one of the best grocerymen and sharpest business men in this country; he is a man of large means. Mr. W. I know but little of; he appears to be a very nice man. I think his forte lays in the accounting and financial department. He is a brother-in-law of Mr. C. P. Norris, vice-president 1st National Bank (this city). This change is a very important one to your house and to me, as it will
9 add a large amount of cash capital to the house, as well as a large amount of trade which is controlled by Mr. O. The house of F. & B. had succeeded in building up the best family-grocery trade in the city, and was the only exclusively cash grocery house here. The business of the house had grown to where a much larger capital could be profitably employed; hence the change. The new house will have ready in hand all the cash that can be used in it, and I think will do a tremendous trade. They sell for cash only. I have renewed my contract with the new house, and they will furnish all the money needed to make the self-rising flour all that it can be made in all my territory. It is now running about 50 barrels per week, and the house wants it to go to 100 barrels per week in a very short time, and ultimately to double that. I have assured them that I can push it to that point; if they will furnish the material for me to work upon, I will do it. And this is how: I have gotten
10 up a nice receipt-book, containing besides the receipts, a full treatise upon the advantages of the flour; also a full catalogue of goods kept by the house. (I had just finished it for the old firm, and put in the hands of the printer to strike off 3 000; it will now be somewhat enlarged in matter and 5,000 printed.) With these and samples of flour, I am

in person going to visit each and every town in my territory; go to the houses of the leading people in each place and superintend the trials of the flour; and after thus creating a trade or get' some orders in a town, I will establish an agent for its sale. I have the advantage of being acquainted with the prominent people in nine-tenths of all these places. In this way I know I can build up a large trade and keep it, by keeping the quality of the flour good and the price low. The more sold the cheaper it can be afforded. I am going to give my entire time and energy to the flour. I will abide by your thoughtful suggestion that "I should touch nothing outside my legitimate business, no matter how great the profit for speculation may appear." The changes in my affairs that have occurred within the last year have taught me a life-lesson. I am thankful to you for the advice. I am now down, but don't intend to stay so. I am young and healthy and energetic, and am determined to get my nose away from the grind-stone. The house bears all expenses for advertising and pay my traveling expenses, and with the interest I have in the sale of the flour, if I can push its sale up to 75 or 100 bbls. per week I will soon be able to free myself completely. I am in dead earnest, and mean to accomplish all that is in the business. My bankrupt case is now in progress of court and as Mr. Finnie informs me that in his conversation with you at your house, you claim that I had no legal right to include the privilege to prepare S. R. F. in my territory in my schedule of assets, and that you hold that the day I closed my house and ceased to offer prepared flour for sale, the right you had vested in me was forfeited to you, and at once became your property; also that the exclusive privilege you granted me was not in fact a patent right as alluded to in the provisions of the bankrupt act. Since learning this, I have filed an amendment to my petition and schedule, setting forth this fact; and my attorney says you are right. Now, I have not the remotest idea of doing anything that would bear even the semblance or color of taking any unfair advantage of my creditors, let alone doing that which would be a fraud upon them. I desire to do nothing but that which will bear a close investigation in open sunlight; but business is business, and I do not wish to have taken away from my hands and control that which will again put me on my feet, so I can meet my creditors hereafter as an honest conscience would dictate to me, notwithstanding the law had discharge' me from debt. Now, if you rule that the right, so far as I was concerned, was null, and reverted to you upon my suspension of business, I want to make a new contract with you for five (5) years, commencing Feb. 1st, 1869, and if you are willing to grant it to me in due form you may at once fill up both sheets and sign yours to me, and enclose with it the one I am to sign to you, and I will sign and return it, retaining my sheet. Thus you will leave in my hands the means of being of far more benefit to yourselves and other creditors than I could possibly hope to be should I in any way be deprived of this right and have to commence life again in some new field. I assure you I will work more diligently and earnestly to accomplish success if possible than I have heretofore done, and hope you may see fit to renew the exclusive right to me for the same territory as before. I will operate it all and canvass it all in person. I am satisfied the field of labor in it is amply sufficient to fully interest me without any other business on hand, and I shall

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have no other in future. If you think this is a fair, square, and honorable proposition from me, I will thank you for your compliance with it;
14 but if you do not, please appreciat' my motives, for they are pure and free from a desire to throw any obstacles in any one's way. On the other hand I am studying the interest of yourselves and other creditors, and only desire to retain in my hands the means to forward their interest and yours (in me). If I succeed all will be benefitted, but if I am crippled by leaving my vocation, I cannot help any one—at least, within so short a time. To close, the whole question turns on this point: If you have confidence in me and believe me to be an honest man, and that I will do at as early a day as I can what you would expect an honest man would, then you are interested in my success to the am't on your books opposite my name, so far as the past is concerned; also, what you estimate my energy at for the future. Please let me hear from you without delay.

Yours, truly,

ALLEN F. MORGAN.

I will start out canvassing soon as my books are printed.

15 EXHIBIT G.—ALLEN F. MORGAN.

MEMPHIS, *9th Feb.*, 1869.

JOHN DWIGHT & Co., *New York:*

DEAR SIR: Yours of 4th inst. to hand, in which you say "we have no objection to giving you (me) a new license as you (I) request, but it must be with the assent and consent of Oliver, Finnie & Co." By this I see you fail to understand the relationship existing between O., F. & Co. and myself. The' have no ownership or partnership in the license whatever. The substance of the contract (which is to expire Ap'l 1st, 1870) is this: O., F. & Co. furnish all the flour (to be of acceptable quality to me), to furnish all the ingredients to be purchased of John Dwight & Co., I furnishing them permission to become such purchaser during the continuance of the contract, and, of course withdraw it at its close. They, of course, are to guarantee to you or to satisfy you as regards payment for them.
That is our affair between J. D. & Co. and O., F. & Co., but this
16 I will say, I am confident your remittance will be very prompt indeed. Mr. Oliver will be in your city about the last of this month and will bear a letter of introduction from me with my assent to his purchasing acid when he has given you all satisfactory references as regards the reliability of his firm. These references he will furnish in N. Y. O., F. & Co. also agree to furnish me house-room in rear of their store free of rent, also light, fuel, license, city (State, city, and county) taxes, insurance, in short, everything except what I shall name as my side of the contract. I agree to keep myself possessed of the exclusive right to prepare flour in the old limits (as per old license), and at my own expense to defend it in suits at law (should I see fit to cause any, or should any be brought against me.) I am to give my own entire time and energy to pushing the business, and am to have every facility afforded me that I may ask for to this work at the expense of O., F. & Co., such as travelling expenses, advertising, *ect.*,
17 *ect.*, I come to them with a business which has an established demand, which has cost me nearly three years of hard labor and much

money. I furnish the tools, machines, &c., for preparing the flour, and pay my men out of my own means. I prepare the flour and put in such packages as demanded by O., F. & Co., and deliver it to them; I have nothing further to do with it; they sell it, and deliver it, and collect their money (on delivery). I am paid a stipulated rate per barrel for all the flour I prepare; so you can readily see I am interested in making its sale as great as possible, and so are O., F. & Co. I am to foster the spread and demand for the flour, and they are to furnish the matters to do so with, and I am going into every nook and corner of all my territory and build up a trade such as will astonish you. Nashville, Tenn., Huntsville, Ala., and Vicksburg, Miss., shall be fully attended to, as well as all
18 minor places. Thus, gentleman, you can readily see that the consent or assent of O., F. & Co. would have no bearing in the case, as all they have to do with it is to satisfy you that you will get your pay for what goods you sell them during the continuance of the contract. The reason I limited my contract to Ap'l 1st, 1870, was that the partnership of O., F. & Co. is limited to that date, but if all parties are suited it may be extended. So may mine; but suppose the firm is dissolved, and each goes to himself in a new grocery house, who would own the S. R. F. license? I propose that A. F. Morgan should own it in his own name and right. I then will very likely be able to handle the business on my own account, but if not, I then will be free to connect myself with some good house where the S. R. F. business would not lag. You can at once see the advantage of my business added to a grocery house like O., F. & Co. (I mean the advantage to the grocery). It being the principal de-
19 pot for the flour, all the small, and in fact all the other grocers in the place, have to come or send there for it. O., F. & Co. thus secure the advantage of the opportunity to show and sell other goods, and almost secure the butt-end of the jobbing grocery trade in Memphis.

Yours, truly,

ALLEN F. MORGAN.

20 THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee:

I, Bell W. Etheridge, clerk of the circui tcourt of the United States for said western district of Tennessee, do hereby certify that the papers hereto attached are *a* full, true, perfect, and correct copies of the original Exhibits M, B, F, & G to the deposition of John R. Maurice which were read in evidence on the trial of the cause in said court, and which have been omitted in making up the transcript to Supreme Court as the same now appear of record and upon the files in my office, in the following cause, to wit: No. 1916. Rumford Chemical Works, use of Payne & wife, adm'rs, vs. Oliver, Frinnie & Co.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 20th day of October, A. D. 1882, and of the Independence of the United States the 107th year.

[SEAL.] BELL W. ETHERIDGE, *Clerk.*
, *D. C.*

(Indorsed:) No. 1916. Circuit court of the United States, western district of Tennessee. Rumford Chem'l Works, use of Payne & wife, vs. Oliver Finnie and Company. Fee, $275.

(Also indorsed:) Supreme Court U. S., 1882, October term. No. 211. Oliver Finnie & Co., pl'ffs in error vs. The Rumford Chemical Works, &c. Stipulation of counsel and addition to record. Filed 4th, Nov., 1882.